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ARTICLE

FIRST THINGS LAST: AMENDOMANIA AND STATE BILLS OF RIGHTS

Donald E. Wilkes, Jr.

COMMENTS

A PLEA FOR A UNIFORM STATUTE OF LIMITATIONS IN PRIVATE CAUSES OF ACTION UNDER THE NLRA

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FIRST THINGS LAST: AMENDOMANIA AND STATE BILLS OF RIGHTS

*Donald E. Wilkes, Jr.**

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.

—*Winston S. Churchill*¹

[T]he natural progress of things is for liberty to yield and government to gain ground.

—*Thomas Jefferson*²

I. FIRST THINGS FIRST

State bills of rights preceded the federal Bill of Rights. From June 1776, when the Virginia Declaration of Rights (the first state bill of rights) was adopted, until December 1791, when the federal Bill of Rights was ratified, eight states each adopted a bill of rights as a separate part of their state constitution.³

* Professor of Law, University of Georgia School of Law. B.A. 1965, J.D. 1969, University of Florida. Member of the Georgia Bar.

This article is dedicated to Robert J. Farley, Dean Emeritus of the University of Mississippi School of Law.

The author expresses his gratitude to Ms. Christine Maxwell, M.A., for her mastery of the word processor used to prepare the manuscript of this article.

¹ W.S. CHURCHILL, REMARKS ON PRISON ADMINISTRATION, REPORT OF SUPPLY (HOME OFFICE) in 19 HANSARD, col. 1354 (July 20, 1910).

² Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), in 7 WRITINGS OF THOMAS JEFFERSON 37 (A. Lipscomb ed. 1904).

³ For the text of and commentary on these early state declarations of rights, see 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231-379 (1971). See also Bravenec, *The New Hampshire Bill of Rights in the Constitution of 1784 and the Treatment of Dissenters During the American Revolution*, 8 N.H.B.J. 244, 246 (1966); Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 95 (1982).

The states adopting bills of rights before 1791 were: (1) Virginia (1776); (2) Pennsylvania (1776); (3) Delaware (1776); (4) Maryland (1776); (5) North Carolina (1776); (6) Ver-

State constitutional rights existed even before there was a United States Constitution. Furthermore, the federal Bill of Rights contains provisions derived from earlier state bills of rights. Indeed, virtually every guarantee in the federal Bill of Rights can be traced to a similar guarantee in one of the bills of rights adopted in the states during the War of Independence or shortly thereafter.⁴ It is likely that the framers of the Constitution thought that the first bulwark of defense for the protection of the rights of citizens would be state bills of rights.⁵ One reason given at the 1787 Convention for not adding a bill of rights to the completed Constitution was that the state bills of rights remained undisturbed and were "sufficient" to protect against oppression by government.⁶

Until the ratification of the fourteenth amendment in 1868, parties to state court proceedings enjoyed almost no federally protected rights. Few provisions of the federal Constitution protected individuals from state (as opposed to federal) action, and

mont (1777); (7) Massachusetts (1780); (8) New Hampshire (1784). See generally Wright, *The Early History of Written Constitutions in America*, in *ESSAYS IN HISTORY AND POLITICAL THOUGHT IN HONOR OF CHARLES HOWARD McILWAIN* 344 (1936); Adrian, *Trends in State Constitutions*, 5 *HARV. J. ON LEGIS.* 311, 311 (1968); Black, *The Formation of the First State Constitutions*, 7 *CONST. REV.* 22, 33 (1923); Graham, *The Early State Constitutions*, 9 *CONST. REV.* 222, 229 (1925); Morey, *The First State Constitutions*, 4 *ANNALS* 201, 219 (1893); Pound, *The Development of Constitutional Guarantees of Liberty*, 20 *NOTRE DAME LAW.* 347, 371-79 (1945); Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 *ANNALS* 380, 385-86 (1897).

⁴ See 2 B. SCHWARTZ, *supra* note 3, at 1204 (table giving state antecedents of clauses in Bill of Rights); Dumbauld, *State Precedents for the Bill of Rights*, 7 *J. PUB. L.* 323, 323-44 (1958) (discussing effect of state bills of rights on formulation of federal Bill of Rights).

To be precise, the federal Bill of Rights, as originally proposed by Madison, was based on amendments suggested by the state conventions which had ratified the Constitution in 1788, which recommendations in turn were based on the provisions of the pre-1789 state bills of rights. See *id.* at 323.

See also *People v. Brisendine*, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975) (describing as fiction the idea that state bills of rights were patterned after the federal Bill of Rights).

⁵ See generally Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 *VAL. U.L. REV.* 125, 126-27 (1969); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 *HARV. C.R.-C.L. L. REV.* 271, 275-76 (1973).

⁶ *Project Report: Toward an Activist Role for State Bills of Rights*, *supra* note 5, at 275-76. But see *id.* at 276-77 (Madison's argument that state bills of rights were inadequate).

the rights secured by those provisions (basically the ex post facto, bills of attainder, and impairment of contracts clauses of article I, section 10, and the commerce clause of article I, section 8) were narrow in scope. Prior to the Civil War era, therefore, the only constitutional rights, practically speaking, that could be asserted by criminal defendants in a state court were those guaranteed under state constitutions.⁷ Thus, state bills of rights were the first American bills of rights; they created our very first constitutional rights; and they secured the first — and, until 1868 at least, the only — effective constitutional rights against state action.

Today there is renewed interest in the bills of rights of the fifty states.⁸ The origin of this new concern with state bills of rights is easily understood. Beginning in the early 1970's and continuing to the present, the Supreme Court of the United States, under the leadership of Chief Justice Warren E. Burger, has been leading this country through a counterrevolution in criminal procedure.⁹ The scope of various federal constitutional rights for criminal suspects has been markedly narrowed;¹⁰ the

⁷ "The state constitution was a citizen's only protection against overreaching by state government until the fourteenth amendment was adopted in 1868." Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 158 (1981)(footnote omitted)(emphasis in original).

⁸ See, e.g., Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123 (1978); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984); *The Role of a Bill of Rights in a Modern State Constitution*, 45 WASH. L. REV. 453 (1970).

⁹ See Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985). But see Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62-91 (V. Blasi ed. 1983)(fears that Burger Court would dismantle work of Warren Court have been considerably exaggerated).

¹⁰ See, e.g., *New York v. Quarles*, 104 S.Ct. 2626, 2632 (1984)(adopting public safety exception to *Miranda* requirements); *Michigan v. Long*, 103 S. Ct. 3469, 3480-81 (1983)(in investigatory stop of automobile, officers may conduct area search of passenger compartment to uncover weapons if they have articulable and objectively reasonable belief the suspect is dangerous; fourth amendment does not require suppression of contraband found in such a search); *Oregon v. Bradshaw*, 103 S. Ct. 2830, 2835 (1983)(suppression not required where defendant initiates generalized conversation with police and

selective incorporation principle has come under attack;¹¹ the doctrine of harmless constitutional error has been exalted to new heights;¹² and both postconviction remedies and civil rights remedies for redressing violations of the federal Bill of Rights and of the fourteenth amendment have been severely limited.¹³ While

later makes knowing waiver of rights to counsel and silence); *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983)(adopting a "totality of circumstances" test for evaluating whether informant's tip establishes probable cause for issuance of warrant); *United States v. Ross*, 456 U.S. 798, 820-23 (1982)(probable cause supporting search of automobile also validates warrantless search of containers found therein); *Michigan v. Summers*, 452 U.S. 692, 705 (1981)(detention of occupants of premises while search of premises is conducted pursuant to a warrant is not illegal seizure under fourth amendment); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979)(the installation and use of device to record phone numbers dialed not a search within fourth amendment); *Manson v. Brathwaite*, 432 U.S. 98, 114-17 (1977)(where facts indicated eyewitness's identification of defendant was reliable, identification was admissible even though method was suggestive); *Michigan v. Mosley*, 423 U.S. 96, 104-07 (1975)(where officers halted interrogation when suspect refused to answer further questions and two hours later other officers asked him about different crime after again advising suspect of his rights, incriminating statement in second interrogation admissible under *Miranda*); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973)(custodial arrest of person for driving without a license allows officer to make full search of arrestee's person); *Kirby v. Illinois*, 406 U.S. 682, 690 (1972)(plurality opinion)(rule excluding identifications based on lineup without counsel present does not apply to pre-indictment identification).

¹¹ See *Crist v. Bretz*, 437 U.S. 28, 52-53 (1978)(Powell, J., dissenting)(federal rule that jeopardy attaches when jurors are sworn should not be incorporated in fourteenth amendment); *Ballew v. Georgia*, 435 U.S. 223, 246 (1978)(Powell, J., concurring)(sixth amendment jury trial clause should not be fully incorporated in fourteenth); *Apodaca v. Oregon*, 406 U.S. 404, 369 (1972)(Powell, J., concurring)(all elements of jury trial embodied in sixth amendment should not be fully incorporated into fourteenth).

¹² See, e.g., *United States v. Hasting*, 461 U.S. 499, 510-12 (1983)(prosecutor's allusion to defendant's failure to rebut government evidence harmless error in light of other evidence); *Connecticut v. Johnson*, 460 U.S. 73, 93-99 (1983)(Powell, J., dissenting and joined by Burger, C.J., and Rehnquist and O'Connor, JJ.)(suggesting that there are instances where erroneous instruction embodying conclusive presumption as to intent may be harmless error); *Parker v. Randolph*, 442 U.S. 62, 74-75 (1979)(admission with limiting instructions of confession made by non-testifying co-defendant not fatal to case of defendant who had himself confessed); *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (any error in admitting incriminating statements made to police officer posing as prisoner rendered harmless error by three corroborative confessions); *Schneble v. Florida*, 405 U.S. 427, 432 (1972)(admission of statements made by non-testifying co-defendant harmless error in light of other evidence).

¹³ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-09 (1983)(plaintiff who had been subjected to chokehold by police not entitled to injunction against future use of chokeholds because did not show he was likely to suffer future injury); *Engle v. Isaac*, 456 U.S. 107, 135 (1982)(habeas relief barred by noncompliance with state procedure); *Rose v. Lundy*, 455 U.S. 509, 522 (1982)(habeas petition dismissed where unexhausted as

the Burger Court has been finding new limits to federal constitutional protection, appellate courts in a number of states have, since about 1970, increasingly engaged in the practice of construing their own state bills of rights in criminal cases to provide more protections than are provided under applicable provisions of the Bill of Rights or the fourteenth amendment.¹⁴ This trend among state judiciaries toward granting state constitutional rights that are broader than federal constitutional rights has

well as exhausted claims were presented); *Wainwright v. Sykes*, 433 U.S. 72, 86-91 (1977)(habeas relief barred by failure to comply with state procedure); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976)(habeas relief barred where defendant was afforded opportunity for full and fair litigation of fourth amendment claim in state court); *Francis v. Henderson*, 425 U.S. 536, 542 (1976)(procedural default bars habeas relief for state prisoner absent cause and prejudice); *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976)(civil rights remedies unavailable without requisite showing of case or controversy by plaintiffs); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973)(habeas relief barred for prisoner who pleaded guilty, despite unconstitutional selection of grand jury); *Younger v. Harris*, 401 U.S. 37, 45-49 (1971)(federal injunction of pending state criminal proceeding unavailable without showing of irreparable injury).

¹⁴ See, e.g., *Stringer v. State*, No. 54,805, slip op. at 1-2 (Miss. Feb. 27, 1985)(refusing to relax state exclusionary rule to follow *United States v. Leon*, 104 S.Ct. 3430 (1984)). Compare *State v. Sarmiento*, 397 So. 2d 643, 644-45 (Fla. 1981)(warrantless electronic interception by officers of conversation between undercover officer and defendant in his home violates state constitution) with *United States v. White*, 401 U.S. 745, 749-53 (1971)(plurality opinion)(no fourth amendment violation for police to monitor defendant's conversation with agent). See also *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368-84 (1982)(discussing the trend and giving examples).

Leading writings on this trend in criminal procedure cases include: Friedelbaum, *Independent State Grounds: Contemporary Invitations to Judicial Activism*, in *STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM* 23 (M. Porter & G. Tarr ed. 1982); Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in *STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM* 3 (M. Porter & G. Tarr ed. 1982); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Galie, *The Other Supreme Courts: Judicial Activism Among State Courts*, 33 SYRACUSE L. REV. 731 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

Bibliographies of the writings on this trend in criminal procedure may be found in *STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM* 206-08 (M. Porter & G. Tarr ed. 1982); Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328-29 n.20 (1982); Collins, *Rebirth of Reliance on State Charters: A Fresh Look at Old Issues*, Nat'l L.J., Mar. 12, 1984, at 31-32.

been given different appellations by different commentators. Some have called the trend "the New Federalism;"¹⁵ others have described it as "the New States' Rights."¹⁶ One of the nation's leading jurists and apostles of the New Federalism, Justice Stanley Mosk of the California Supreme Court, speaks of a "phoenix-like resurrection"¹⁷ of the state courts that has occurred over the past several years.

Although it is axiomatic that state constitutional protections may exceed federal constitutional rights,¹⁸ in this century prior to 1970, state courts rarely (except perhaps in substantive economic due process cases¹⁹) exercised their power to expand state-based rights beyond federal rights.²⁰ In some states it was a "doctrine of state constitutional construction" to interpret state constitutional provisions by following federal cases which

¹⁵ E.g., Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221, 221 (1982-83); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977); Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (B. MCGRAW ED. 1985); MARGOLICK, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. TIMES, May 19, 1982, at A1, col. 1.

¹⁶ E.g., Mosk, *The New States' Rights*, 10 CAL. J.L. ENFORCEMENT 81, 81 (1976).

¹⁷ Time, April 4, 1977, at 46, col. 3; see also Collins, *supra* note 14, at 25-26.

¹⁸ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-81 (1980)(state constitution may provide more expansive protection for individual liberties than federal Constitution); *Oregon v. Hass*, 420 U.S. 714, 719 (1975)(state, through its own laws, may impose restrictions on police operations that are greater than restrictions imposed by federal Constitution); *Cooper v. California*, 386 U.S. 58, 62 (1967)(state has power to effect greater restrictions on searches and seizures than necessary under federal Constitution). See generally Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951)(discussion of freedom of expression protections under state constitutions); Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318 (1968)(same).

¹⁹ See, e.g., *Cleere v. Bullock*, 146 Colo. 284, 361 P.2d 616, 621 (1961)(statute requiring that funeral directors have skill and knowledge equal to embalmers deemed arbitrary and capricious and a violation of due process under state constitution); *Grocers Dairy Co. v. McIntyre*, 377 Mich. 71, 138 N.W.2d 767, 771 (1966)(statute limiting size of containers used in sale of milk violation of due process clause of state constitution). See generally Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 252-61 (1981)(discussion of state court activism in substantive economic due process area).

²⁰ See generally Note, *supra* note 15, at 299 n.13 (discussion of state courts' pre-1970 reluctance to interpret state constitutions beyond scope of the federal Constitution).

had interpreted similar federal constitutional provisions.²¹ Even today, many state courts follow the practice of interpreting state bills of rights in accordance with the way the Supreme Court has interpreted the federal Bill of Rights.²²

The New Federalism is under growing attack from all directions. The Burger Court, usually anxious to defer to state judiciaries out of considerations of comity and federalism,²³ has exercised more than any previous Supreme Court the power to review state judgments upholding claims of denial of constitutional rights,²⁴ and has modified the adequate state ground rule in a manner that expands the Court's jurisdiction to examine state court judgments vindicating claims of denial of rights.²⁵

²¹ Paulsen, *supra* note 18, at 621-22.

²² Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63, 88 n.121 (1977); see also Linde, *supra* note 14, at 382-83 (to interpret state constitutions, most state courts follow interpretations of the federal Constitution).

²³ See generally C. WRIGHT, LAW OF FEDERAL COURTS § 52A (1983).

²⁴ See *Oregon v. Hass*, 420 U.S. 714, 726 (Marshall, J., dissenting)(criticizing the Court's increasing willingness to review state court opinions "upholding constitutional claims in criminal cases"); *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316, 1319 (1983)(referring to Burger Court's "current campaign not to let state . . . courts draw more protective constraints from the federal constitution's guarantees in matters of criminal law than the Court itself is prepared to recognize"). See generally Collins, *Plain Statements: The Supreme Court's New Requirement*, A.B.A.J., Mar. 1984, at 92 (discussion of Burger Court's trend of reviewing state court decisions which protect civil liberties); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1242-63 (1978)(criticism of Supreme Court's practice of reviewing state court decisions enforcing parts of the federal Constitution that are underenforced by Supreme Court); Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 823-33 (1983)(discussion of Burger Court's review of state court decisions expanding protections for individuals).

Justice Stevens has become the Burger Court's most vocal opponent of the Court's penchant for reviewing, on the petition of state authorities, state court decisions upholding a defendant's claim that his basic rights had been violated. See *Florida v. Myers*, 104 S. Ct. 1852, 1854, 1855-56 (1984)(Stevens, J., dissenting); *Michigan v. Long*, 103 S. Ct. 3469, 3489, 3490-92 (1983)(Stevens, J., dissenting); *South Dakota v. Neville*, 459 U.S. 553, 566, 566-71 (1983)(Stevens, J., dissenting).

²⁵ In the first place, the Supreme Court has treated the adequate state ground rule in a manner that permits review of state judgments that hold a defendant's rights have been violated, even though the state court announced in its opinion one or more times that its decision rested on state as well as federal grounds. In other words, the Burger Court has enthroned the principle that it need not treat as dispositive statements by a state court that its decision vindicating a right rests in part on state law. See *Michigan v. Long*, 103 S. Ct. 3469, 3477 (1983)(Michigan Supreme Court's references to state consti-

Not surprisingly, therefore, the Supreme Court on several recent occasions has reversed or vacated state supreme court judgments in criminal cases, even though the state court had stated in its opinion that its decision rested on a construction of the state bill of rights.²⁶ Chief Justice Burger, ordinarily a leading exponent of notions of comity and federalism, has impliedly criticized New Federalism decisions by implying that it is irrational for state judges to extend state constitutional protections beyond the minimum level necessary to avoid infringing on federal constitutional rights.²⁷

The most severe criticism of the New Federalism has been leveled by state judges, often in dissenting opinions.²⁸ The com-

tution not controlling as to whether decision rested on adequate and independent state grounds); *South Dakota v. Neville*, 459 U.S. 553, 556 (1983)(although South Dakota Supreme Court held that the state statute violated state and federal constitutional guarantees against self-incrimination, United States Supreme Court determined that state court's decision rested on federal grounds); *Delaware v. Prouse*, 440 U.S. 648, 651-52 (1979)(even though Delaware Supreme Court made references to state constitution, United States Supreme Court determined that the state court "did not intend to rest its decision independently on the State Constitution"). See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)(Ohio Supreme Court decision deemed to rest solely on federal grounds since decision did not mention state constitution but did mention cases interpreting federal constitution).

Secondly, the Court has created a presumption of jurisdiction in cases where the decision in favor of a claim of a rights violation arguably rests on state grounds, and has required state courts to make a "plain statement" of the state law basis of the decision if they then seek to avoid the effect of the presumption. *Michigan v. Long*, 103 S. Ct. 3469, 3476-77 (1983). See *Collins*, *supra* note 24, at 92 (in cases where state court does not make a plain statement of reliance on state grounds, Supreme Court will presume decision was based on federal grounds); Greenhalgh, *Independent and Adequate State Grounds: The Long and Short of It*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 211, 211-38 (B. McGraw ed. 1985).

²⁶ See, e.g., *Michigan v. Long*, 103 S. Ct. 3469, 3473-74, 3483 (1983)(reversing Michigan Supreme Court decision which held that search of passenger compartment of defendant's car was illegal, even though state supreme court referred to state constitution twice in its opinion); *South Dakota v. Neville*, 459 U.S. 553, 556, 564 (1983)(reversing South Dakota Supreme Court decision which held that state statute "violated the federal and state privilege against self-incrimination"). See *Collins*, *supra* note 24, at 92 (Supreme Court reviewing state court decisions upholding civil liberties even when based on state law).

²⁷ See *Florida v. Casal*, 103 S. Ct. 3100, 3101 (1983)(Burger, C.J., concurring in dismissal of certiorari). For discussion of the Chief Justice's comment, see *infra* text accompanying notes 111-16.

²⁸ See, e.g., *People v. Disbrow*, 16 Cal. 3d 101, 117-21, 545 P.2d 272, 282-83, 127 Cal. Rptr. 360, 370-73 (1976)(Richardson, J., dissenting)(criticizing majority for not interpret-

mentary in scholarly journals has on the whole been warmly favorable,²⁹ but a few scholars have criticized the New Federalism to the extent that state court use of state law has been motivated by disagreement with results reached in Burger Court decisions which take a narrower view of individual rights.³⁰ Surely the most unusual scholarly criticism of the New Federalism is to be found in Professor Willing's ninety-nine page law review article, published in 1982.³¹ Professor Willing believes that there is a federal right to effective law enforcement protection, a right secured by the privileges and immunities clause of article IV of the Constitution³² or the privileges or immunities clause³³ or the due process clause of the fourteenth amendment.³⁴ It is his thesis

ing the self-incrimination clause of the California Constitution as the United States Supreme Court interprets the fifth amendment); *People v. Norman*, 14 Cal. 3d 929, 940-42, 538 P.2d 237, 245-47, 123 Cal. Rptr. 109, 117-19 (1975) (Clark, J., dissenting) (criticism of majority's decision not to follow the United States Supreme Court's interpretation of the fourth amendment when construing the California constitution's search and seizure clause); see also Note, *supra* note 15, at 297 n.7 (collecting cases).

²⁹ See, e.g., Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596 (1979); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980).

³⁰ Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 189-90 (1983); Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 741-42 (1976).

³¹ Willing, *Protection by Law Enforcement: The Emerging Constitutional Right*, 35 RUTGERS L. REV. 1 (1982).

³² *Id.* at 54-57. Professor Willing argues that the privileges and immunities clause of article IV, which traditionally has been construed to forbid state discrimination against non-residents, can be interpreted to provide certain fundamental rights for the citizens of each state. *Id.* at 55, 56. Professor Willing notes, however, that such an interpretation is highly unlikely. *Id.* at 57.

³³ *Id.* at 54-65. According to Professor Willing, effective law enforcement is a privilege or immunity guaranteed through United States citizenship. *Id.* at 65. Under Professor Willing's theory, if a state fails to provide effective law enforcement, the Constitution obligates the federal government to intervene and provide adequate law enforcement for the citizens. *Id.* at 59, 65.

³⁴ *Id.* at 65-68. Professor Willing notes that the Supreme Court has recognized that certain fundamental rights are inherent in the Constitution and must be protected under the fifth and fourteenth amendment due process clauses. *Id.* at 65. Professor Willing points out that commentators have defined "fundamental rights" as those rights which are traditional or which are a necessary part of the concept of ordered liberty. *Id.* at 66, 67. Accordingly, since effective law enforcement is inherent to the Anglo-American scheme of justice, it should be deemed a fundamental right protected through the due

that New Federalism decisions involving "truly extreme state-created rights of criminal defendants" may be unconstitutional³⁵ (and reversible by the United States Supreme Court) if they interfere with the right to protection from crime he believes to be guaranteed by the federal Constitution. Thus, according to Professor Willing, section 1 of the fourteenth amendment does not merely secure the rights of individuals against the exercise of governmental power; it may also constitute a conferral of power on the states to enforce their criminal laws effectively.³⁶ According to this view, the fourteenth amendment is as much an authorization for the states to exert coercive powers against the individual as it is for protecting individuals from abuses by government agents. In effect, the government now is to have constitutional "rights" to investigate and punish violations of the criminal law.

The New Federalism has also fallen under political and electoral attack.³⁷ These attacks have included attempts by the political right and exponents of "law and order" to politicize the judicial decision-making process by electing governors who appoint judges committed to narrowing the rights of "criminals,"³⁸ by sending out communications that threaten judges with ad-

process clause of the fourteenth amendment. *See id.* at 67-68.

³⁵ *Id.* at 85. Professor Willing does not adequately explain what rights he would regard as "truly extreme," but apparently he believes that a state search and seizure exclusionary rule without a standing requirement (a "vicarious exclusionary rule") would be one of these "truly extreme" rights. *See id.* at 78.

³⁶ *See id.* at 58, 65-79.

³⁷ *See* Egelko, *The Bittersweet Aftermath of Confirming 'Jerry's Judges'*, CAL. J., Dec. 1982, at 445-46 (three California Supreme Court justices retained by voters despite strong opposition from political groups); *Ore. Court Seat Fight Gets Bitter*, Nat'l L.J., May 14, 1984, at 3, col. 4 (Justice Hans Linde of the Oregon Supreme Court opposed for re-election by law and order groups and candidate who claim Linde is soft on criminals); Turner, *Law-and-Order Groups Oppose an Oregon Justice*, N.Y. Times, Apr. 2, 1984, at A17, col. 1 (same). For an example of the nature of the current debate, with particular regard to the role of the judiciary in American society, see *Politicization of the Courts: Balancing the Need for Judicial Independence Against the Need for Judicial Accountability*, 6 HARV. J.L. & PUB. POL'Y 295 (1983).

³⁸ In states where judgeships are filled by gubernatorial appointment, one may find gubernatorial candidates promising to appoint judges who will be "strict constructionists." *See* Baker, *Deukmejian: Fighting Crime No. 1 Priority*, Sacramento Bee, Apr. 22, 1982, at AA5, col. 1 (Republican candidate for governor promises "to appoint judges who are more concerned with the rights of victims than the rights of criminals").

verse political consequences if they rule in favor of "criminals" in pending cases,³⁹ and by seeking recall or defeat at the polls of state judges deemed "soft" on "criminals."⁴⁰ Unquestionably, however, the most important recent political or electoral assault on the power of state courts to find in state law rights broader than rights secured under federal law has been the trend in a number of states over the past decade and a half to amend state bills of rights to deprive individuals of criminal procedure rights they previously enjoyed.

The "voter backlash"⁴¹ that produced these constitutional amendments taking away constitutional rights was predictable. For half a century scholars have expressed concern about what has been termed "amendomania,"⁴² the tendency to amend state constitutions frequently and to constitutionalize provisions of law that are essentially statutory in character, often by an uninformed or uninterested electorate approving an initiative measure.⁴³ With the rise of crime as a political issue and the resurgence of the political right and "law and order" factions, it was certain that sooner or later liberal interpretations of state constitutional provisions would be subjected to pressures from conservative politicians and an increasingly conservative electorate.

Since 1970, at least nineteen important amendments to state bills of rights, designed to curtail criminal procedure rights, have been adopted in some fourteen states. Three of the amendments, all of which are set out in the margin,⁴⁴ restored

³⁹ See Wilkes, *supra* note 15, at 168, 193 n.12.

⁴⁰ Chief Justice Rose Bird of the California Supreme Court has been the object of this kind of attack. For accounts of her difficulties, see B. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS* (1983) and P. STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981).

⁴¹ Williams, *supra* note 30, at 192 n.100.

⁴² See Note, *California's Constitutional Amendomania*, 1 *STAN. L. REV.* 279, 279 (1949).

⁴³ See, e.g., McMurray, *Some Tendencies in Constitution Making*, 2 *CALIF. L. REV.* 203, 209-21 (1914) (recognizing tendency to treat constitutions as "codes" and predicting confusion from amendment by initiative); Note, *supra* note 42, at 279-81 (frequent amendment causes constitutions to grow in size, causes the content of constitutions to change so that they become more like statutes, and causes the purposes of constitutions to change).

⁴⁴ The amendments include:

the death penalty. One amendment, in Connecticut, reduced the size of juries in noncapital cases to six persons. Another, in Florida, altered the state constitutional provision corresponding to the fourth amendment. Twelve of the amendments, including a 1982 California amendment known as the Victims' Bill of Rights, permit some form of preventive detention of criminal suspects awaiting trial. The California Victims' Bill of Rights also contains other provisions affecting the state bill of rights, including a provision that with certain exceptions purports to create an anti-exclusionary rule requiring admission of all relevant evidence (even though it may have been obtained in violation of the state constitution).

<u>State</u>	<u>Year of Adoption</u>	<u>Nature of Amendment</u>	<u>Section Amended or Added</u>
Arizona	1970	Preventive detention	Article II, § 22
Utah	1972	Preventive detention	Article I, § 8
California	1972	Death penalty	Article I, § 27
Connecticut	1972	Jury trial	Article I, § 19
Texas	1977	Preventive detention	Article I, § 11a
Michigan	1978	Preventive detention	Article I, § 15
Nebraska	1978	Preventive detention	Article I, § 9
New Mexico	1980	Preventive detention	Article II, § 13
Wisconsin	1981	Preventive detention	Article I, § 8
Vermont	1982	Preventive detention	Chapter II, § 40
California	1982	Victims' Bill of Rights: Preventive detention; Admission of illegally seized evidence; miscellaneous provisions	Article I, § 28
California	1982	Proposition 4: Preventive detention	Article I, § 12
Florida	1982	Search and Seizure; admission of illegally seized evidence	Article I, § 12
Florida	1982	Preventive detention	Article I, § 14
Arizona	1982	Preventive detention	Article II, § 22
Massachusetts	1982	Death penalty	Part I, art. 26
Connecticut	1982	Eliminates right to grand jury indictment	Article 17
Pennsylvania	1984	Admissibility of suppressed evidence for impeachment	Article I, § 9
Oregon	1984	Death penalty	Article I, § 40

From the chart in the margin, it may be seen that 1977 appears to be the turning point. Between 1970 and 1976, only four amendments were adopted; from 1977 through 1984, some fifteen amendments were approved, including eight in 1982. It may also be noted that during the 1970-1984 period, four states—California, Connecticut, Arizona and Florida—approved more than one amendment. A statistical summary, however, does not adequately portray the trend. A fuller understanding requires exploration of the background and effect of several of these amendments.

II. BRINGING BACK THE DEATH PENALTY: A DIFFERENT ROLE FOR STATE BILLS OF RIGHTS

The first of the death penalty amendments was adopted in California in 1972. On February 18 of that year, in *People v. Anderson*,⁴⁶ the state's supreme court struck down capital punishment on the grounds it violated the provision of the state bill of rights analogous to the cruel and unusual punishments clause of the eighth amendment.⁴⁶ The *Anderson* decision provoked popular and political discontent. The decision was opposed by police and prosecutors, who within a month had begun a campaign to reinstate capital punishment, insofar as state law was concerned, by using the initiative process to amend the state constitution.⁴⁷ On November 7, 1972, by the overwhelming ma-

⁴⁶ 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972).

⁴⁶ *Id.* at 651, 493 P.2d at 895, 100 Cal. Rptr. at 167. The *Anderson* court stated: "Measured by the 'evolving standards of decency that mark the progress of a maturing society,' capital punishment is, therefore, cruel within the meaning of article I, section 6, of the California Constitution." *Id.*, 493 P.2d at 895, 100 Cal. Rptr. at 167.

The constitutional section provides, in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. . . ." CAL. CONST. art. I, § 6.

⁴⁷ See Barrett, *Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739, 743 & n.18 (1972).

Critics of the *Anderson* decision included then-Gov. Ronald Reagan, who, according to a newspaper account, described the *Anderson* court's action as having made "a mockery of the constitutional processes" and reinforcing "'the widespread concern of our people that some members of the judiciary inject their own philosophy into their decision rather than carrying out their constitutional duty to interpret and enforce the law.'" *Id.* at 743 (quoting San Francisco Chronicle, Feb. 19, 1972, § 1, at 1, col. 3). Immediately after the *Anderson* decision, Gov. George Deukmejian, then a state senator, an-

jority of sixty-eight percent, California voters approved the restoration of capital punishment through an initiative constitutional amendment that added a new section 27 to the state bill of rights.⁴⁸ This was unquestionably a huge victory for "law and order" advocates and a stunning setback for the California Supreme Court.

Section 27 provides:

All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.⁴⁹

The California death penalty amendment is a curious hybrid; it has legislative as well as constitutional provisions. The first paragraph is essentially a statute reenacting the previous legislation involving the death penalty in effect on the day before the *Anderson* decision. It makes those reenacted statutes subject to amendment by statute. The second paragraph is not legislative but constitutional in nature. It overturns *Anderson* by declaring that death is not a cruel or unusual punishment, and it goes even further: it provides that death as punishment does not violate any other part of the state constitution.

Three weeks after the amendment was approved by the electorate, the California Supreme Court, in *People v. Murphy*,⁵⁰ coolly described the amendment only as "*purporting* to nullify *Anderson's* holding of the invalidity of the death penalty. . . ."⁵¹ The court also stated that *ex post facto* law principles barred "application of the amendment to cases arising

nounced plans to sponsor a constitutional amendment to restore the death penalty. L.A. Times, Feb. 19, 1972, § I, at 1, col. 4, & 26, col. 1.

⁴⁸ See L.A. Times, Nov. 9, 1972, § I, at 20, col. 4 (discussing death penalty initiative); *id.* at 22, col. 1 (voting results).

⁴⁹ CAL. CONST. art. I, § 27.

⁵⁰ 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1972).

⁵¹ *Id.* at 352 n.2, 503 P.2d at 596 n.2, 105 Cal. Rptr. at 140 n.2 (emphasis added).

before its effective date. . . ."⁵²

In 1979, in *People v. Frierson*,⁵³ the California Supreme Court candidly acknowledged that "[t]he clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty to the extent permitted by the federal Constitution."⁵⁴ The court rejected the argument that the amendment applies solely to statutes in effect in February 1972 (when *Anderson* was decided) and that all subsequently enacted death penalty legislation is still governed by the *Anderson* rule.⁵⁵ The *Frierson* court therefore concluded: "section 27 validates the death penalty as a permissible type of punishment under the California Constitution."⁵⁶ It is noteworthy that this conclusion was not drawn until seven years after the amendment was adopted.

Arguably, the most important California Supreme Court decision involving the 1972 amendment is *People v. Superior Court (Engert)*,⁵⁷ decided in 1982. There, the court declined to accept the state's argument that the amendment precluded courts from inquiring into the validity of "laws, substantive and procedural, relating to [the death penalty's] administration and imposition."⁵⁸ The court held instead:

The 1972 initiative was intended simply to cancel the holding of *Anderson*, to clarify that the penalty of death does not violate any provision of the California Constitution: e.g., it is not cruel and unusual punishment; it does not, per se, violate the state due process clause; it does not, per se, deprive individuals of equal protection.⁵⁹

Thus, the death penalty amendment did not "insulate . . . capital case[s] from the requirement of state constitutional due process."⁶⁰ Accordingly, the court struck down a death penalty ag-

⁵² *Id.*, 503 P.2d at 596 n.2, 105 Cal. Rptr. at 140 n.2.

⁵³ 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

⁵⁴ *Id.* at 185, 599 P.2d at 612, 158 Cal. Rptr. at 306 (emphasis in original).

⁵⁵ *Id.* at 184-85, 599 P.2d at 612-13, 158 Cal. Rptr. at 306-07.

⁵⁶ *Id.* at 186, 599 P.2d at 613, 158 Cal. Rptr. at 307 (emphasis in original).

⁵⁷ 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

⁵⁸ *Id.* at 807, 647 P.2d at 81, 183 Cal. Rptr. at 805.

⁵⁹ *Id.* at 808, 647 P.2d at 82, 183 Cal. Rptr. at 806.

⁶⁰ *Id.* at 809, 647 P.2d at 82, 183 Cal. Rptr. at 806.

gravating circumstance on the grounds it was vague and violative of due process.⁶¹ It would further appear from *Engert* that the California Supreme Court believes, the 1972 amendment notwithstanding, that the court retains power to declare a sentence of death unconstitutional if it is disproportionate to the offense, as where capital punishment is imposed for a minor crime.⁶²

The second death penalty amendment was adopted in Massachusetts in 1982. In 1975 the Massachusetts Supreme Judicial Court had decided *Commonwealth v. O'Neal*,⁶³ declaring a statute making capital punishment mandatory for rape-murder unconstitutional under a provision of the Massachusetts Declaration of Rights that is similar to the eighth amendment.⁶⁴ Two years later, in an advisory opinion, the judges of the same court advised the Massachusetts legislature that a proposed death penalty statute also would violate the state bill of rights.⁶⁵ Ultimately, a 1979 death penalty statute⁶⁶ was declared unconstitutional in *District Attorney v. Watson*,⁶⁷ with the state's highest court holding that under the Massachusetts Declaration of Rights, capital punishment was *per se* cruel.⁶⁸

⁶¹ *Id.* at 806, 647 P.2d at 81, 183 Cal. Rptr. at 805.

⁶² *See id.* at 809, 647 P.2d at 82, 183 Cal. Rptr. at 806. In rejecting the position that § 27 immunized death penalty statutes from judicial review under the state constitution, the court noted that the logical extension of this argument "would produce absurd results," including preventing review if the statute established death as the penalty for being a common drunk. *Id.*, 647 P.2d at 82, 183 Cal. Rptr. at 806.

⁶³ 369 Mass. 242, 339 N.E.2d 676 (1975).

⁶⁴ *O'Neal*, 339 N.E.2d at 688, 693, 694, 696 (separate opinions).

⁶⁵ Opinion of the Justices, 372 Mass. 912, 364 N.E.2d 184, 186-87 (1977). The court stated that article 26 of the Massachusetts Declaration of Rights (cruel or unusual punishments clause) "forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose . . . than the availability in like cases of the penalty of life imprisonment." 364 N.E.2d at 186-87.

⁶⁶ Act of Aug. 14, 1979, ch. 488, 1979 Mass. Acts 502.

⁶⁷ 381 Mass. 648, 411 N.E.2d 1274, 1287 (1980).

⁶⁸ *Watson*, 411 N.E.2d at 1283. In *Watson*, in contrast to Opinion of the Justices, 372 Mass. 912, 364 N.E.2d 184 (1977), the court held that the death penalty was offensive to contemporary standards of decency, that it was arbitrarily inflicted, and that even a statute that met the federal constitutional demands of *Furman v. Georgia*, 408 U.S. 238 (1972), would offend art. 26 of the Massachusetts Declaration of Rights. *Watson*, 411 N.E. 2d at 1281, 1283, 1286.

The movement to amend the Massachusetts Constitution to reinstate capital punishment may be traced to 1976, shortly after the *O'Neal* decision was announced.⁶⁹ However, the movement did not begin to gain significant ground until 1978, when Edward King was elected Governor of Massachusetts. King, a strong backer of the death penalty, campaigned on a pro-capital punishment platform.⁷⁰ In the following year, Governor King signed into law a new death penalty statute.⁷¹ In 1980, this statute was found unconstitutional by the state's highest court in *District Attorney v. Watson*.⁷² On September 19, 1980, the movement mustered enough political clout to obtain passage in the state legislature (sitting as a constitutional convention) of a proposed amendment to the state bill of rights for restoring capital punishment.⁷³ The proposed amendment repassed the legislature (again sitting as a constitutional convention) on June 21, 1982.⁷⁴ Thereafter, it was placed on the ballot at the November 2, 1982, general election and adopted, with fifty-four percent of the electorate favoring the amendment, thirty-five percent voting against it, and eleven percent leaving their ballots blank.⁷⁵ The effort to adopt the amendment had been opposed at every step, inside the legislature as well as out. Opponents included a number of liberal, civil rights, church, humanitarian, and social justice organizations.⁷⁶

The 1982 amendment added two sentences to part 1, article 26, of the Massachusetts Constitution. (Article 26 is the provision of the Massachusetts Declaration of Rights that corre-

⁶⁹ See Sales, *Conte Ready to Fight Again for Death Penalty*, Boston Globe, June 6, 1976, at 46, col. 1.

⁷⁰ See N.Y. Times, Nov. 8, 1978, at A21, col. 1; see also Boston Herald American, Feb. 21, 1982, at 5.

⁷¹ See Act of Aug. 14, 1979, ch. 488, 1979 Mass. Acts 502.

⁷² 381 Mass. 648, 411 N.E.2d 1274, 1278 (1980). For the court's holding, see *supra* note 68 and accompanying text.

⁷³ See MASSACHUSETTS ELECTION STATISTICS 1982, at 472 (1982); see also Wilkes, *supra* note 15, at 181.

⁷⁴ See MASSACHUSETTS ELECTION STATISTICS 1982, at 472 (1982).

⁷⁵ *Id.*

⁷⁶ See, e.g., *Church Leaders to Fight Death Penalty*, Boston Herald American, Feb. 21, 1982, at 5. The Office of the Governor of Massachusetts compiled a list of some three dozen organizations that were opposing reinstatement of the death penalty. This document was made available to the author, and a copy is in his files.

sponds to the eighth amendment.) The added sentences provide:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.⁷⁷

The 1982 amendment apparently has not ended the matter in Massachusetts, however. In December 1982, shortly before he left office, Governor King signed new death penalty legislation into law.⁷⁸ The Supreme Judicial Court, almost two years later, struck down the portions of this legislation that authorized the death penalty as unduly burdening a defendant's state constitutional guarantees to a jury trial and against self-incrimination.⁷⁹ Construing the 1982 constitutional amendment as forbidding only a per se prohibition of capital punishment, the court held that the amendment had not insulated death penalty statutes from invalidation for other constitutional infirmities.⁸⁰

⁷⁷ MASS. CONST. pt. 1, art. 26.

⁷⁸ See MASS. GEN. LAWS ANN. ch. 265 § 2, ch. 279 §§ 57-71 (West Supp. 1985).

⁷⁹ *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E. 2d 116, 124 (1984). The court reasoned that since the statute provided for imposition of the death penalty only after a jury trial, defendants in capital cases could avoid the risk of being put to death by pleading guilty. Thus, the statute discouraged defendants from asserting their right to trial by jury, and, in violation of state law, penalized defendants for not pleading guilty. *Colon-Cruz*, 470 N.E. 2d at 124-29.

⁸⁰ *Colon-Cruz*, 470 N.E. 2d at 121-23. The Court keyed its analysis to the use of the word "prohibit" in the 1982 amendment and stated: "We do not consider that our invalidation of this statute is equivalent to prohibiting the punishment of death." 470 N.E. 2d at 122. Conceding that the 1982 amendment prevented it from construing any part of the state constitution as forbidding the death penalty in every circumstance, 470 N.E.2d at 121 & n.10, the court determined that nothing in the amendment's legislative history suggested that the amendment was intended to "shield all death penalty legislation from review under the Massachusetts Constitution." 470 N.E. 2d at 123. This latter "radical construction" of the amendment "would mean that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution." *Id.*

Three of the court's seven members dissented, with two arguing that the 1982 amendment precluded review, under the state constitution, of death penalty legislation. See *Colon-Cruz*, 470 N.E. 2d at 135 (Nolan, J., dissenting).

III. AND THEN THERE WERE SIX: CONNECTICUT'S JURY TRIAL AMENDMENT

Prior to 1972, the generally accepted view was that the jury trial section of Connecticut's bill of rights secured the right to a jury of twelve persons.⁸¹ Nonetheless, there was strong support for reducing jury size in criminal cases. In 1930 the Connecticut Judicial Council "proposed an amendment to the Constitution authorizing the Legislature to provide for a jury of less than twelve."⁸² Two years later, the Council abandoned its proposal for amending the state constitution and suggested instead that a rule of court be promulgated under which "the jury should number nine in every case, unless a jury of twelve were specifically claimed."⁸³ In 1953, the Connecticut legislature enacted a statute⁸⁴ embodying the 1932 proposal but providing for a jury of six instead of nine.⁸⁵ Four years later, the Supreme Court of Errors of Connecticut held the 1953 statute to be constitutional in *State v. Perrella*,⁸⁶ but in so deciding, continued to assume that the right to jury trial included the right to a jury of twelve.⁸⁷

In 1972, the Connecticut legislature approved a proposed amendment to the jury trial section of the state bill of rights,⁸⁸ a proposal worded similarly to an amendment that had been suggested by Judge Richard Phillips in an influential 1956 state bar journal article favoring jury size reduction.⁸⁹ The amendment, adopted at the November 7, 1972, general election, added to the state constitution the language emphasized here:

⁸¹ See *State v. Perrella*, 144 Conn. 228, 129 A.2d 226, 228-29 (1957) (essential feature of jury trial is that jury should contain 12 persons); see also Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354, 358 & n.7 (1956) (former Connecticut supreme court chief justice expressed opinion that Connecticut constitution required 12-member juries).

⁸² Phillips, *supra* note 81, at 355.

⁸³ *Id.*

⁸⁴ CONN. GEN. STAT. ANN. § 54-82 (West Supp. 1984) (current version of the 1953 statute).

⁸⁵ Phillips, *supra* note 81, at 355.

⁸⁶ 144 Conn. 228, 129 A.2d 226, 229 (1957).

⁸⁷ See *Perrella*, 129 A.2d at 229 ("[s]o long as the statute does not cut off his right to a trial by jury of twelve altogether or impose unreasonable conditions upon the assertion of that constitutional right, the statute [sic] is valid on whatever theory it may be predicated").

⁸⁸ See 1971 Conn. Pub. Acts, H.J.R. 83.

⁸⁹ See Phillips, *supra* note 81, at 358.

Sec. 19. The right of trial by jury shall remain inviolate, *the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent*⁹⁰

Presumably, some impetus for the amendment came from the Burger Court's decision in *Williams v. Florida*⁹¹ in 1970, which held that neither the sixth amendment jury trial clause nor the fourteenth amendment due process clause guaranteed the right to a twelve-person jury.⁹² In 1976, in *State v. Olds*,⁹³ the Connecticut Supreme Court upheld the constitutionality of the 1972 amendment in a case involving a defendant convicted of robbery and other crimes by a jury of six persons.⁹⁴

IV. FLORIDA'S SEARCH AND SEIZURE AMENDMENT: "RATIONAL LAW ENFORCEMENT"?

The Florida Supreme Court adopted a search and seizure exclusionary rule⁹⁵ long before the United States Supreme Court made the fourth amendment exclusionary rule binding on the states in *Mapp v. Ohio*.⁹⁶ When Florida adopted a new state

⁹⁰ CONN. CONST. amend. IV (amending art. 1, § 19).

⁹¹ 399 U.S. 78 (1970).

⁹² *Id.* at 103. The Court stated, however:

We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group.

Id. (footnote omitted).

⁹³ 171 Conn. 395, 370 A.2d 969 (1976).

⁹⁴ *Olds*, 370 A.2d at 971, 976-77. In *Olds* the defendant's contention was that the 1972 amendment infringed impermissibly upon the powers of the judiciary, i.e., that it was a judicial, not a legislative, function to determine jury size. *Id.*

⁹⁵ See, e.g., *Gildrie v. State*, 94 Fla. 134, 113 So. 704, 705 (1927)(evidence seized under an invalid search warrant is not admissible).

⁹⁶ 367 U.S. 643, 655 (1961). See *Sing v. Wainwright*, 148 So. 2d 19, 20 (Fla. 1962)(United States Supreme Court's application of exclusionary rule to the states added nothing new to Florida law). Compare *Gildrie v. State*, 94 Fla. 134, 113 So. 704, 706 (1927)(evidence obtained by illegal search in violation of Florida Constitution and ex-

constitution in 1968, section 12 of the state's bill of rights, the section analogous to the fourth amendment, included for the first time in any state charter, a specific exclusionary rule provision: "Articles or information obtained in violation of this right shall not be admissible in evidence."⁹⁷ The history of this exclusionary rule provision shows that it was added to protect the state's exclusionary rule against the possibility that in the future state judges might erode the rule.⁹⁸

The Florida Supreme Court, on several occasions from 1979 through 1982, interpreted the 1968 exclusionary rule provision to mean that Florida judges were required to guarantee Floridians a greater degree of immunity from police search and seizure practices than that secured by the fourth amendment.⁹⁹ These New Federalism search and seizure cases apparently aroused the opposition of members of the law enforcement community. In 1980, a Miami policeman began a campaign to amend the state constitution to relax the higher Florida search and seizure protections, gradually obtaining support from certain politicians.¹⁰⁰ Then in 1982, the Governor of Florida, Bob Graham, asked the state legislature for an amendment to cut back on state search

cludable when proper objection made) *with Mapp*, 367 U.S. at 655 ("all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

⁹⁷ FLA. CONST. art. I, § 12 (1968).

⁹⁸ See generally Comment, *The Exclusionary Rule: An Examination of the Case Law and the Present Posture of the Florida Supreme Court*, 10 FLA. ST. U.L. REV. 369, 381-83 (1982).

⁹⁹ See, e.g., *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981)(Florida constitution's search and seizure section bars warrantless electronic monitoring by police of conversation in private home between resident and undercover officer even though permitted under federal Constitution); *Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980)(state must prove by clear and convincing evidence that consent search was voluntary); *Grubbs v. State*, 373 So. 2d 905, 909-10 (Fla. 1979)(acknowledging that state constitution affords greater protection than fourth amendment and holding that probation condition that probationer submit to search at any time at the request of any law enforcement officer violates Florida constitution's search and seizure provision); see also *State v. Dodd*, 419 So. 2d 333, 335 (Fla. 1982)(state constitutional search and seizure section bars use of illegally seized evidence in probation revocation proceedings); *State v. Casal*, 410 So. 2d 152, 155-56 (Fla. 1982)(though marine patrol officers may stop vessels for such limited purposes as checking registration certificates, they may not search without probable cause), *cert. dismissed*, 103 S. Ct. 3100 (1983).

¹⁰⁰ Spring, *Cop Bulldogs Constitutional Change*, Miami Herald, Oct. 24, 1982, at 1B, col. 2.

and seizure rights not protected by the fourth amendment.¹⁰¹ The Governor's position was that his state "should extend no more rights to those who would break our laws than the U.S. Constitution would require."¹⁰² Governor Graham even went so far as to suggest that the granting of state-based rights broader than federal rights amounts to "allow[ing] . . . advantage to the criminal. . . ."¹⁰³

In June 1982, the Florida legislature granted Governor Graham's request and passed a proposed constitutional amendment¹⁰⁴ designed to curtail both the Florida exclusionary rule and the higher level of protection from search and seizure practices that had existed under Florida law.¹⁰⁵ Between its passage by the Legislature in June and the November general election, the proposed amendment received strong support from Governor Graham and members of the law enforcement community. On November 2, 1982, the electorate approved the proposed amendment by some sixty-four percent of the votes.¹⁰⁶

Here is the present text of section 12 of Florida's bill of rights, with the wording added by the 1982 amendment emphasized:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissi-

¹⁰¹ See J. FLA. SEN. 1982 Reg. Sess., at 5 (Jan. 18, 1982); J. FLA. SEN. 1982 Spec. Sess., at 2-4 (June 21, 1982).

¹⁰² J. FLA. SEN. 1982 Spec. Sess., at 3 (June 21, 1982).

¹⁰³ J. FLA. SEN. 1982 Reg. Sess., at 5 (Jan. 18, 1982).

¹⁰⁴ J. FLA. SEN. 1982 Spec. Sess., at 21 (June 22, 1982).

¹⁰⁵ J. FLA. SEN. 1982 Spec. Sess., at 3 (June 21, 1982).

¹⁰⁶ Miami Herald, Nov. 3, 1982, at 12A, col. 4.

ble in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*¹⁰⁷

In 1983, in *State v. Lavazzoli*,¹⁰⁸ the Florida Supreme Court held that the 1982 search and seizure amendment is not retroactive.¹⁰⁹ In *Lavazzoli*, which at this writing is the only important Florida appellate opinion construing the 1982 amendment, the court described the intended effect of the amendment in this way:

Prior to the amendment, the right of a citizen of the State of Florida to be free from unreasonable searches and seizures was guaranteed independently of the similar protection provided by the fourth amendment to the United States Constitution. Under article I, section 12 as it existed prior to the amendment, the courts of this state were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. . . . The new amendment, however, links Florida's exclusionary rule to the federal exclusionary rule, making it also nothing more than a creature of judicial decisional policy and removing the "independent protective force of state law."¹¹⁰

The 1982 Florida search and seizure amendment was hatched in the philosophy that it is wrong for a state constitution or court to protect individual rights to a greater degree than does the federal constitution. This philosophy is reflected in the portion of the amendment compelling Florida courts to interpret state constitutional search and seizure protections in accordance with United States Supreme Court interpretation of the fourth amendment. If the rule of construction applied to search and seizure in Florida by the 1982 amendment were extended to state constitutional rights generally, there would be no need or function whatever for state bills of rights. The maximum level of

¹⁰⁷ FLA. CONST. art. I, § 12 (emphasis added).

¹⁰⁸ 434 So. 2d 321 (Fla. 1983).

¹⁰⁹ *Id.* at 323-24; see also *State v. Williams*, 443 So. 2d 952, 954 (Fla. 1983)(refusing to apply amendment retroactively).

¹¹⁰ 434 So. 2d at 323-24 (footnote omitted).

protection to which persons would be entitled in state court would be determined solely by reference to the federal Bill of Rights, and the United States Supreme Court's construction of federal constitutional rights would be binding on state courts interpreting the scope of state bill of rights protections, if there were any. The first would become the last.

A remarkable comment about the 1982 Florida amendment has come from Chief Justice Burger. In 1982 in *State v. Casal*,¹¹¹ the Florida Supreme Court rejected the state's claims under the open fields doctrine and affirmed an order in a criminal case suppressing evidence that the lower court had found to have been seized illegally.¹¹² The State of Florida then petitioned for certiorari, which was granted.¹¹³ The writ was later dismissed after the Supreme Court determined that the state court judgment rested on independent and adequate state grounds.¹¹⁴ Chief Justice Burger filed a concurring opinion in which he quoted the 1982 amendment, commented on its effect, and observed: "[t]he people of Florida have . . . shown acute awareness of the means to prevent . . . inconsistent interpretations" of the state constitution and the fourth amendment.¹¹⁵ The Chief Justice then described the power that the Florida electorate had exercised in 1982 — the power to amend a bill of rights provision so as to curb individual rights and thereby overturn or prevent state court decisions requiring more rights than the federal constitution requires — as the "power . . . to ensure rational law enforcement."¹¹⁶ Can this mean that the Chief Justice believes the Florida Supreme Court, or any state court, engages in *irrational* behavior when it exercises its ancient and traditional power to extend state constitutional protections beyond those secured by federal law?

¹¹¹ 410 So. 2d 152 (Fla. 1982).

¹¹² *Id.* at 156.

¹¹³ *Florida v. Casal*, 459 U.S. 821 (1982).

¹¹⁴ *Florida v. Casal*, 103 S. Ct. 3100, 3100 (1983).

¹¹⁵ *Id.* at 3101 (Burger, C.J., concurring).

¹¹⁶ *Id.* at 3101-02.

V. A TON OF DETENTION: THE RISE OF PREVENTIVE JUSTICE IN STATE BILLS OF RIGHTS

The right to pretrial bail, a right not found in the federal Bill of Rights, has a long and distinguished history in the states.¹¹⁷ Early in the nineteenth century, Connecticut became the first state to insert into its bill of rights a provision that in effect guaranteed criminal defendants the right to bail prior to trial, unless the charge was capital and the proof of guilt was evident or the presumption of guilt great.¹¹⁸ Thereafter, other states followed suit,¹¹⁹ and by 1970 the bills of rights in thirty-seven states guaranteed the right to bail.¹²⁰ By 1978, forty-two states provided a right to bail, thirty-five by bill of rights provisions, and seven by statute.¹²¹ It is not surprising that when the Nixon administration first proposed enactment of a federal preventive detention statute,¹²² the idea was met by opposition founded on the view that preventive detention was unconstitutional, not to mention inconsistent with the presumption of innocence.¹²³

Texas was the first state to amend its constitution to permit preventive detention, adding a section 11a to the state bill of rights.¹²⁴ As originally adopted in 1956, the amendment provided for preventive detention for sixty days if the defendant had two previous felony convictions.¹²⁵ In 1970, the District of

¹¹⁷ See generally *Hunt v. Roth*, 648 F.2d 1148, 1159 (8th Cir. 1981)(discussion of the development of right to bail in colonial America), *vacated as moot sub nom.* *Murphy v. Hunt*, 455 U.S. 478 (1982); Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COL. L. REV. 328, 337-54 (1982)(discussion of right to bail from colonial America to present day).

¹¹⁸ *State v. Johnson*, 61 N.J. 351, 354, 294 A.2d 245, 247 (1972); see also *State v. Konigsberg*, 33 N.J. 367, 371, 164 A.2d 740, 742 (1960).

¹¹⁹ *State v. Johnson*, 61 N.J. 351, 354, 294 A.2d 245, 247 (1972).

¹²⁰ *Id.*, 294 A.2d at 247.

¹²¹ *In re Humphrey*, 601 P.2d 103, 105, 108 apps. I & II (Okla. Crim. App. 1979).

¹²² See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1223 (1969)(President Nixon called for legislation which would allow pretrial detention of dangerous criminal defendants).

¹²³ See, e.g., Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376, 379 (1970).

¹²⁴ See 1955 Tex. Gen. Laws 1816.

¹²⁵ *Id.* Section 11a was itself amended in 1977. In addition to the two prior convictions provision, it now authorizes denial of bail to a person accused of committing a non-

Columbia became the first American jurisdiction to provide by statute for "pretrial detention of individuals found to be dangerous to the community."¹²⁶

Since 1970, there has been a noticeable trend in the direction of preventive detention, evidenced by the fact that twelve amendments in ten states (Arizona, California, Florida, Michigan, Nebraska, New Mexico, Texas, Utah, Vermont and Wisconsin) have been adopted to permit preventive detention of one kind or another.¹²⁷ Two states, Arizona and California, have adopted more than one such amendment. Ten of these amendments have been adopted since 1976, with five approved in four states in 1982 alone. Thus, the number of states with a bill of rights bail provision similar to the 1818 Connecticut provision has dropped significantly since 1970. The state constitutional right to bail has been curtailed.

California adopted two preventive detention amendments on the same day. On June 8, 1982, that state's voters approved Proposition 4, an amendment that had been proposed by the legislature. Proposition 4 amends former section 12 of the Cali-

capital felony while on bail for another felony for which he had been indicted, and to a person with one prior felony conviction who is accused of a non-capital felony involving the use of a deadly weapon. See TEX. CONST. § 11a.

¹²⁶ Comment, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U.L. REV. 191, 191 n.7 (1982). See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 473, 642-50 (codified at D.C. CODE ANN. §§ 23-1321 to -1332 (1981 & Supp. 1984)). For discussion of the constitutionality of the District of Columbia preventive detention statute, see *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981); *Blunt v. United States*, 322 A.2d 579 (D.C. 1974).

¹²⁷ The amended constitutional sections and commentary on the amendments include: *Arizona*: ARIZ. CONST. art. II, § 22 (amended twice). *California*: CAL. CONST. I, § 12 (Proposition 4); CAL. CONST. art. I, § 28 (Victims' Bill of Rights). See generally Comment, *Proposition 4: Preventive Detention v. Pretrial Liberty*, 14 PAC. L.J. 303 (1983). *Florida*: FLA. CONST. art. I, § 14. *Michigan*: MICH. CONST. art. I, § 15. *Nebraska*: NEB. CONST. art. I, § 9. *New Mexico*: N.M. CONST. art. II, § 13. See generally Norwood & Novins, *The Constitutionality of Pretrial Detention Without Bail in New Mexico*, 12 N.M.L. REV. 685 (1982); Comment, *The Constitution is Constitutional—A Reply to "The Constitutionality of Pretrial Detention Without Bail in New Mexico,"* 13 N.M.L. REV. 145 (1983). *Texas*: TEX. CONST. art. 1, § 11a. See generally Collins, *The Right to Bail in Texas*, 18 HOUS. L. REV. 495 (1981). *Utah*: UTAH CONST. art I, § 8. *Vermont*: VT. CONST. ch. II, § 40. See generally DeTora, *Restricting the Right to Bail: Vermont's New Constitutional Bail Amendment*, 8 VT. L. REV. 347 (1983). *Wisconsin*: WIS. CONST. art. I, § 8.

fornia state bill of rights, which was then a right to bail section similar to the 1818 Connecticut constitutional provision.¹²⁸ Under the amended section, bail may now be denied not only in capital cases, but also in certain noncapital felony cases where release could result in great bodily harm to others.¹²⁹

On the same day, the California electorate approved another constitutional amendment, an initiative measure known as the Victims' Bill of Rights.¹³⁰ Section 2 of the Victims' Bill of Rights repeals former section 12 of the state bill of rights, and section 3 of the measure creates, inter alia, a new section 28(e) in the state bill of rights. The catchline title of section 28(e) is "Public Safety Bail." Under section 28(e), a judge entertaining a pretrial bail application must "take into consideration the protection of the public," and in granting or denying release "[p]ublic safety shall be the primary consideration."¹³¹ Under California law, conflicts between the bail provisions of Proposition 4 and of the Victims' Bill of Rights, if any, are to be resolved in favor of the proposal that received the most votes.¹³² Since Proposition 4 outpolled the Victims' Bill of Rights, it appears that section 12 of the state constitution, as amended by Proposition 4, would control conflicting bail provisions of the Victims' Bill of Rights.¹³³ Should Proposition 4 be declared invalid, the provisions of the Victims' Bill of Rights relating to bail apparently would come fully into effect.¹³⁴

In some states, a preventive detention amendment was adopted not long after the state supreme court issued a decision holding that preventive detention was prohibited under the right-to-bail provision of the state bill of rights, but also observing that the state constitution was open to amendment by the

¹²⁸ See CAL. CONST. art. I, § 12 (West Supp. 1985)(publisher's Commentary and Historical Note); see also Comment, *Proposition 4*, *supra* note 127, at 303.

¹²⁹ CAL. CONST. art. I, § 12 (b) & (c).

¹³⁰ Comment, *Proposition 4*, *supra* note 127, at 329.

¹³¹ CAL. CONST. art. I, § 28(e).

¹³² See CAL. CONST. art. XVIII, § 4.

¹³³ See *In re Spitler*, 204 Cal. Rptr. 443, 451-52 (Cal. Ct. App. 1984)(holding that § 12 controls conflicting provision of § 28(e)); see also *Brosnahan v. Brown*, 32 Cal. 3d 236, 255, 651 P.2d 274, 285, 186 Cal. Rptr. 30, 41 (1982)(noting in dictum that Proposition 8 bail provisions may not have taken effect).

¹³⁴ Comment, *Proposition 4*, *supra* note 127, at 329 & n.192.

voters to authorize preventive detention.¹³⁵ The other amendments appear to be explainable simply as part of the overall trend toward law and order and increased emphasis on crime control, even at the cost of individual rights.

In overview, the procedures authorized by the twelve preventive detention amendments fall into three general patterns. First, some of the provisions of the amendments have expanded the capital crimes exception to the right to bail to include certain specified noncapital crimes, generally violent felonies.¹³⁶ Second, some of the amendments permit preventive detention if there is a specific showing that release of the defendant would result in physical harm to another or danger to the community.¹³⁷ Third, other provisions permit preventive detention when the defendant is charged with having committed a serious crime while on bail on another charge, or while on probation or parole.¹³⁸ Some of the amendments place a time limit on how long a defendant may be incarcerated prior to trial,¹³⁹ while others impose no time limits.¹⁴⁰

No state appellate court has, thus far, held any of the preventive detention amendments invalid. At least one state supreme court has upheld the validity of a preventive detention amendment.¹⁴¹ A federal appellate court in 1981 did hold the Nebraska amendment unconstitutional under the eighth amendment,¹⁴² but its decision was vacated by the Burger Court on

¹³⁵ For examples of such decisions, see *In re Underwood*, 9 Cal. 3d 345, 350, 508 P.2d 721, 724, 107 Cal. Rptr. 401, 404 (1973); *State v. Pray*, 133 Vt. 537, 346 A.2d 227, 230 (1975).

¹³⁶ *E.g.*, NEB. CONST. art. I, § 9; VT. CONST. ch. II, § 40.

¹³⁷ *E.g.*, FLA. CONST. art. I, § 14.

¹³⁸ *E.g.*, UTAH CONST. art. I, § 8.

¹³⁹ *E.g.*, MICH. CONST. art. I, § 15 (90 days).

¹⁴⁰ *E.g.*, ARIZ. CONST. art. II, § 22.

¹⁴¹ See *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106, 109 (1979) (rejecting federal constitutional challenge to state constitutional amendment which added certain "sexual offenses" to those offenses for which bail could be denied), *cert. denied*, 444 U.S. 920 (1979); see also *Ex parte Miles*, 474 S.W.2d 224, 225 (Tex. Crim. App. 1971) (state constitutional provision allowing denial of bail to persons charged with a non-capital felony who had two prior felony convictions did not discriminate against a class).

¹⁴² See *Hunt v. Roth*, 648 F.2d 1148, 1165 (8th Cir. 1981), *vacated sub nom.* *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

mootness grounds.¹⁴³

VI. THE CALIFORNIA VICTIMS' BILL OF RIGHTS: JUSTICE WEARING A BLACK ARMBAND?

On June 8, 1982, California voters, by a fifty-six percent majority, approved the Victims' Bill of Rights,¹⁴⁴ an initiative measure containing both constitutional amendments and statutory provisions. The Victims' Bill of Rights is divided into ten sections. Section 1 gives the measure its title.¹⁴⁵ Section 2 repeals the former section 12 of the California state bill of rights, relating to the right to bail, but appears to have been superseded, at least in part, by another amendment adopted on the same day.¹⁴⁶ Sections 4 through 9 are statutory and amend the Penal Code or other statutory provisions, while section 10 is a severability clause.¹⁴⁷

Section 3 warrants discussion here. It adds a new section 28 to the state's bill of rights. Section 28 has seven subdivisions. Section 28(a) declares that the "rights of victims pervade the criminal justice system" and justify "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons"¹⁴⁸ A California appellate court has held that this "statement of principles" is "not self-executing."¹⁴⁹

Section 28(b) requires restitution "from the convicted persons in every case . . . unless compelling and extraordinary reasons exist to the contrary."¹⁵⁰ Section 28(c) purports to guaran-

¹⁴³ See *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982) (once defendant was convicted his claim to bail was moot "because even a favorable decision on it would not have entitled [him] to bail").

¹⁴⁴ See 1983-1984 ALMANAC OF CALIFORNIA GOVERNMENT AND POLITICS 190 (1983).

¹⁴⁵ OFFICE OF THE SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 8, 1982, 33 [hereinafter cited as BALLOT PAMPHLET] reprinted in *Wilson v. Superior Court*, 134 Cal. App. 3d 1062, 185 Cal. Rptr. 678, 733-40 (1982), vacated, 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983), cert. denied, 104 S. Ct. 1929 (1984).

¹⁴⁶ See *supra* notes 128-34 and accompanying text.

¹⁴⁷ See BALLOT PAMPHLET, *supra* note 145, at 33, 56.

¹⁴⁸ CAL. CONST. art. I, § 28(a).

¹⁴⁹ *People v. Sweeney*, 150 Cal. App. 3d 553, 198 Cal. Rptr. 182, 193 (1984).

¹⁵⁰ CAL. CONST. art. I, § 28(b).

tee a "right to safe schools."¹⁵¹

Section 28(d) is the most controversial provision of the entire Victims' Bill of Rights. Section 28(d) purports to create a new "right"—the "right to truth-in-evidence." Under section 28(d), all "relevant evidence"—with certain specified exceptions—is admissible in criminal trials and proceedings.¹⁵² Although on its face this language might seem to permit admission of evidence inadmissible under the federal Bill of Rights or the fourteenth amendment, the background of the initiative clearly shows no intention to attempt to interfere with federally protected rights.¹⁵³ Rather, section 28(d) was framed for the purpose of requiring the admission of relevant evidence obtained in violation of a *state* constitutional right or otherwise illegally under *state* law.¹⁵⁴ Section 28(d) excepts four types of evidence from its blanket rule of admissibility: (1) evidence rendered inadmissible by a statute passed — subsequent to adoption of section 28(d)—by a two-thirds vote of both houses of the legislature; (2) evidence inadmissible under any "existing statutory rule of evidence relating to privilege or hearsay"; (3) evidence inadmissible under the state's rape shield statutes¹⁵⁵ or within a court's statutory discretionary power to exclude because its probative value is outweighed by time considerations or by the likelihood of confusion or undue prejudice;¹⁵⁶ and (4) evidence inadmissible under "any existing statutory or constitutional right of the press."¹⁵⁷

Section 28(e) provides for preventive detention, but, as discussed above, apparently has been superseded in part.¹⁵⁸ Section

¹⁵¹ See *id.* § 28(c).

¹⁵² *Id.* § 28(d).

¹⁵³ See BALLOT PAMPHLET, *supra* note 145, at 32.

¹⁵⁴ See *id.*; see also CAL. CONST. art. I, § 28(d).

¹⁵⁵ CAL. CONST. art. I, § 28(d); see CAL. EVID. CODE § 782 (West Supp. 1985)(setting forth circumstances under which evidence of sexual conduct of an alleged victim of a sex crime may be admitted to attack the complainant's credibility); *id.* § 1103 (West Supp. 1985)(making admissible certain evidence regarding the character of the victim of a crime but excluding evidence of sexual conduct—other than with the defendant—of the victim of a sex offense to show consent).

¹⁵⁶ This discretionary power is recognized by CAL. EVID. CODE § 352 (WEST 1966).

¹⁵⁷ See CAL. CONST. art. I, § 28(d).

¹⁵⁸ See *supra* text accompanying notes 128-34.

28(f) makes it a part of the state constitution that "[a]ny prior felony conviction" may "be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."¹⁵⁹ It further provides that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."¹⁶⁰ Finally, section 28(g) defines the term "serious felony," a term which had been used in section 28(e).¹⁶¹

A look at the origin and background of the Victims' Bill of Rights is useful in understanding the trend that is the concern of this article. According to one account, the proposal originated with a then-assistant state attorney general and a state senator, who enlisted the help of California conservative activist Paul Gann. Proponents prepared twenty-two drafts before emerging with the initiative proposal that was presented to Californians for their signatures.¹⁶² The movement to place the Victims' Bill of Rights on the ballot was "led largely by political conservatives"¹⁶³ and obtained more than 663,000 signatures in favor of placing the proposal on the ballot.¹⁶⁴ In March 1982, the California legislature passed in one day a special act granting a temporary reduction in the showing that had to be made to the secretary of state to obtain certification that the required number of valid signatures had been gathered.¹⁶⁵ This assured that the amendment would be on the June 8 ballot. The amendment received "widespread support among law-and-order forces, includ-

¹⁵⁹ CAL. CONST. art. I, § 28(f).

¹⁶⁰ *Id.*

¹⁶¹ *See id.* § 28(e) & (g).

¹⁶² San Jose Mercury, Apr. 29, 1982, at A1, col.2. Gann, a chief architect of the well-known 1978 California tax-cutting initiative called Proposition 13, *see* NEWSWEEK, June 14, 1982, at 64, had also sponsored other initiatives to limit state spending and cut the state income tax and had been an unsuccessful candidate for the United States Senate in 1980. *See* Schrag, *Crime on the Ballot*, THE NEW REPUBLIC, June 2, 1982, at 10; *see also* Hurley, *Confusion Reigns in Aftermath of Proposition 8*, 21 JUDGES' J., Summer 1982, at 1, 1-2 (1982)(quoting Gann views on the Victims' Bill of Rights).

¹⁶³ Hurley, *supra* note 162, at 1.

¹⁶⁴ *See* Brosnahan v. Eu, 31 Cal. 3d 1, 2, 641 P.2d 200, 200, 181 Cal. Rptr. 100, 100 (1982).

¹⁶⁵ *See* Act of Mar. 8, 1982, ch. 102, 1984 Cal. Leg. Serv. 481 (West); *see also* Brosnahan v. Eu, 31 Cal. 3d 1, 2-4, 641 P.2d 200, 200-01, 181 Cal. Rptr. 100, 100-01 (1982)(detailing controversy over number of signatures).

ing the California Sheriffs Association, the California District Attorneys Association, and more than 150 police chiefs."¹⁶⁶ Its proponents asserted that some 30,000 police officers on the line of duty supported the amendment.¹⁶⁷

Support for the Victims' Bill of Rights was undoubtedly increased as a result of widespread dissatisfaction with the California Supreme Court. The court was perceived as being too lenient with criminals;¹⁶⁸ its image was further tarnished by the controversy and investigation resulting from suggestions that the court delayed, for political reasons, the filing of decisions in sensitive cases, particularly *People v. Tanner*;¹⁶⁹ and on top of all this, Chief Justice Rose E. Bird was the object of a politically motivated recall effort.¹⁷⁰

The California Supreme Court denied a request to remove the amendment from the ballot prior to the June 8 election,¹⁷¹ and even though a poll released three weeks before the election indicated that seventy-five percent of the voters had never heard of the amendment,¹⁷² it was approved by fifty-six percent of those voting. After the election, the Court refused to hold that the amendment had been adopted improperly.¹⁷³

¹⁶⁶ Cochran, *Paul Gann's Proposition 8: A 'Victims' Bill of Rights' or a Lawyers' Employment Act?*, 13 CAL. J. 133, 133 (1982); see also *San Francisco Chronicle*, May 22, 1982, at 8, col.1 (reporting that law enforcement groups overwhelmingly supported the amendment).

¹⁶⁷ See BALLOT PAMPHLET, *supra* note 145, at 35 (statement of Paul Gann).

¹⁶⁸ See Beach, *No Longer Best or Brightest*, TIME, Nov. 29, 1982, at 57; Winter, *Victim Rights Bill Fuels Get-Tough Stand*, 68 A.B.A. J. 530, 530 (1982); see also BALLOT PAMPHLET, *supra* note 145, at 34 (statements by proponents of amendment that courts had been too concerned with rights of defendants).

¹⁶⁹ 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978), *vacated*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979). For an account of this controversy, see P. STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981); see also Mosk, "Chilling Judicial Independence"—*The California Experience*, 3 W. NEW ENG. L. REV. 1, 1-2 & n.3 (1980) (commentary on the controversy by a member of the California Supreme Court).

¹⁷⁰ For discussion of the recall attempt as well as other aspects of the controversy surrounding the court, see B. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS* (1983); see also *GOP Leaders Give Up Drive to Oust Bird*, *Sacramento Bee*, Mar. 10, 1982, at A6, col. 1.

¹⁷¹ See *Brosnahan v. Eu*, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982).

¹⁷² See *San Francisco Chronicle*, May 22, 1982, at 8, col. 1.

¹⁷³ See *Brosnahan v. Brown*, 32 Cal. 3d 236, 262, 651 P.2d 274, 289, 186 Cal. Rptr.

In the 1983 case of *People v. Smith*,¹⁷⁴ the California Supreme Court held the Victims' Bill of Rights to be prospective only,¹⁷⁵ and in early 1985, the court held that section 28(d), the "Truth in Evidence" provision, did not nullify doctrines immunizing certain statements of juvenile defendants from use as substantive evidence at trial.¹⁷⁶ More importantly, however, and only four days later, the court held that adoption of section 28(d) eliminated the exclusionary rule as a remedy for unlawful searches and seizures under California law.¹⁷⁷ Though the means by which particular evidence was obtained might still violate California law, the four-to-three majority held, the evidence could be excluded only if suppression were required by federal law¹⁷⁸ or if one of the statutory exceptions to section 28(d) applied.¹⁷⁹ The majority conceded that the California court had "long considered the exclusionary rule to be the only effective means of deterring police misconduct in violation of the search and seizure provisions of the federal or state Constitutions," but:

30, 45-46 (1982).

In dissent, Justice Stanley Mosk argued that the broad sweep of Proposition 8 caused the measure to violate California's constitutional requirement that amendments be limited to a single subject. Decrying a situation in which "initiative promoters may obtain signatures for any proposal, however radical in concept and effect, and if they can persuade 51 percent of those who vote at an ensuing election to say 'aye,' the measure becomes law regardless of how patently it may offend constitutional limitations," *id.* at 297-98, 651 P.2d at 312, 186 Cal. Rptr. at 68, he went on to conclude: "The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California." *Id.* at 99, 651 P.2d at 313, 186 Cal. Rptr. at 69 (Mosk, J., dissenting).

¹⁷⁴ 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983).

¹⁷⁵ *Id.* at 262, 667 P.2d at 154-55, 193 Cal. Rptr. at 697-98.

¹⁷⁶ See *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 693 P.2d 789, 791-95, 210 Cal. Rptr. 204, 206-10 (1985). Prior to the passage of Proposition 8, statements made by an accused minor to his probation officer or at a hearing to determine whether the minor should stand trial as an adult or be turned over to juvenile authorities could not be used as substantive evidence at trial. The *Ramona R.* court held that Proposition 8's addition of § 28(d) to the California constitution did not eliminate this "use immunity." The court reasoned that state constitutional due process guarantees required such an immunity to protect the defendant's privilege against self-incrimination, and that since § 28(d) specifically exempted from its operation evidence covered by the statutory privilege against self-incrimination, the constitutional amendment did not nullify this immunity. See *id.* at ____, 693 P.2d at 791-95, 210 Cal. Rptr. at 206-10.

¹⁷⁷ See *In re Lance W.*, 37 Cal. 3d 873, ____, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985).

¹⁷⁸ See *id.* at ____, 694 P.2d at 752, 210 Cal. Rptr. at 639.

¹⁷⁹ See *id.* at ____, 694 P.2d at 753, 210 Cal. Rptr. at 640.

The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights, except as required by the Constitution of the United States. Whether they are wise in that decision is not for our determination; it is enough that they have made their intent clear.¹⁸⁰

The three dissenters, among other points, argued that the vagueness of the language of section 28(d), as well as the length and complexity of the initiative measure, made it impossible to determine that the voters had the clear intent to abrogate the California exclusionary rule.¹⁸¹

VII. FIRST THINGS LAST

In an influential article published in 1970, Justice Hans Linde of the Oregon Supreme Court, then a professor of law, argued that when a case in a state court involves constitutional claims, the court should first seek to resolve the question under the state constitution before determining whether there has been a violation of federal rights.¹⁸² He further maintained that if the state constitutional right were vindicated, there was no need thereafter to reach the federal claim.¹⁸³ This position was summarized in maxim form in 1973: *First Things First*.¹⁸⁴ The Oregon Supreme Court, on which Justice Linde sits, and at least one other state supreme court has adopted the position that state constitutional rights should be inquired into before addressing whether federally protected rights also have been vio-

¹⁸⁰ *Id.* at ____, 694 P.2d at 752, 210 Cal. Rptr. at 639.

¹⁸¹ *See id.* at ____, 694 P.2d at 769, 210 Cal. Rptr. at 656 (Mosk, J., dissenting).

¹⁸² *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970). In *Massachusetts v. Upton*, 104 S. Ct. 2085, 2089-91 (1984) (Stevens, J., concurring), Justice Stevens advocated Justice Linde's view that state law is applicable before federal law. *See also* Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L.J. 641, 647-51 (1983) (setting forth reasons why state constitution should be considered before the federal Constitution).

¹⁸³ *See* Linde, *supra* note 182, at 133-35.

Justice Linde has put forward this view in judicial opinions and in scholarly articles. *See, e.g.*, *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316, 1318 (1983) (state law question determined before reaching federal law question); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *supra* note 14.

¹⁸⁴ *See Project Report, supra* note 5, at 286-90; *see also* Linde, *supra* note 14.

lated.¹⁸⁵ There is also agreement that if the state claim is sustained, addressing the federal claim is superfluous.¹⁸⁶

Justice Linde's views envision a state judiciary that has not, by an importuning United States Supreme Court, by political interference, or by state constitutional amendment, been constrained to interpret the state bill of rights restrictively. However, developments since 1970 indicate a growing tendency on the part of the Supreme Court, the political right, and the electorate to curtail state court protection of individual rights. Plainly, the most alarming manifestation of this tendency has been the adoption, in only fifteen years, of at least nineteen criminal procedure amendments to state bills of rights in some fourteen states. If the tendency continues, first things may become last or nonexistent. The body of rights guaranteed by a state constitution might become only "a creature of [federal] judicial decisional policy"¹⁸⁷

The history and development of amending state bills of rights to curtail criminal procedure rights needs investigation. Little has been written on the subject. Certainly, there were occasions prior to 1970 when state bills of rights were amended to restrict rights previously afforded to criminal defendants.¹⁸⁸ On

¹⁸⁵ See *State v. Ball*, 471 A.2d 347, 350-51 (N.H. 1983)(when protection of state constitution has been invoked, state courts must consider state constitutional rights before considering federal constitutional rights); *State v. Scarborough*, 470 A.2d 909, 913 (N.H. 1983)(same); *State v. Tapply*, 470 A.2d 900, 902 (N.H. 1983)(same); *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316, 1318 (1983)("all questions of state law [must] be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states"); *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123, 126 (1981)(same).

¹⁸⁶ See *State v. Ball*, 471 A.2d 347, 351 (N.H. 1983)("we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution"); cf. *Brown v. Multnomah County Dist. Court*, 280 Or. 95, 570 P.2d 52, 55 n.1 (1977)(if state constitution does not provide claimed protections, then look to federal constitution).

¹⁸⁷ See *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983)(noting that constitutional amendment linking exclusionary rule found in state constitution to federal fourth amendment decisions made state rule dependent on federal judicial policy).

¹⁸⁸ For example, Texas in 1956 amended its bill of rights to authorize a form of preventive detention. See *supra* notes 124-25 and accompanying text.

Oregon abolished capital punishment by constitutional amendment in 1914 and then reinstated it by another constitutional amendment in 1920. See *Ex parte Kerby*, 103 Or. 612, 205 P. 279, 279 (1922). In 1964, a subsequent constitutional amendment repealed

the other hand, it seems likely that the trend since 1970 is unprecedented in our history. Moreover, this criminal procedure amendomania is occurring during a criminal procedure counter-revolution when the Supreme Court of the United States is cutting back on rights and remedies. The 1976 decision in *Stone v. Powell*,¹⁸⁹ in which the Burger Court put an end to federal habeas review of fourth amendment claims,¹⁹⁰ is perhaps the best-known example of these curtailments. *Stone* has come to symbolize an era—the day of the Burger Court.

It is likely that underlying the recent constitutional amendments, underlying the criminal procedure counterrevolution, underlying the overall movement to strengthen the law enforcement apparatus and to weaken individual rights, is the popular assumption that increased use of force and repression is the appropriate response to the crime problem. This widespread assumption may be tragically wrong. John Van de Kamp, the attorney general of California and one of the few prosecutors in that state to oppose publicly the Victims' Bill of Rights,¹⁹¹ has noted:

We must not go back to the dark ages of criminal justice
More and more violent repression of criminals will produce
only more violence on their part Violent repression of
criminals can lead to social conditions like those in the Middle

the 1920 amendment, once again abolishing capital punishment. See Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 1 & n.2 (1965); Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1 (1979). In 1984, Oregon voters changed their minds again, reinstating the death penalty by adopting a constitutional amendment that began as an initiative. See OR. CONST. art. I, § 40.

In 1936, the search and seizure section of Michigan's bill of rights was amended to require the courts to admit illegally seized evidence under certain circumstances. This amendment was designed to overturn prior state supreme court decisions which had held that the search and seizure section of the Michigan bill of rights barred use of illegally seized evidence. See Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 433 n.84 (1981).

¹⁸⁹ 428 U.S. 465 (1976).

¹⁹⁰ See *id.* at 494.

¹⁹¹ See AG Hopeful Van de Kamp Against Proposition 8, Sacramento Bee, June 3, 1982, at A15, col.1; see also Willens, *The Fierce Race for AG—Hard-Line Nick or Low-Key John?*, 13 CAL. J. 361 (1982)(quoting Van de Kamp's opposition to Proposition 8).

East and, eventually, genocidal destruction of the human race.¹⁹²

Anyone familiar with human history will remember two facts about the *Dark Ages*. They were terrible. They came after the *Stone Age*.

¹⁹² *Van de Kamp Decries "Dark Ages" Crime Mentality*, Sacramento Bee, Apr. 29, 1983, at A22, col. 1.

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COMMENTS

A PLEA FOR A UNIFORM STATUTE OF LIMITATIONS FOR PRIVATE CAUSES OF ACTION UNDER THE NLRA

INTRODUCTION

In 1947 Congress amended the National Labor Relations Act¹ to create certain private causes of action over which the federal district courts were to have original jurisdiction. These causes of action were separate from the administrative processing of unfair labor practice complaints² by the National Labor Relations Board, which had been provided for by the original 1935 Act and preserved in all subsequent amendments. The most notable of the private causes of action created in 1947 are suits for breaches of collective bargaining agreements³ and

¹ National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1976)). The National Labor Relations Act (the Act) has been substantially amended twice. In 1947 Congress enacted the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-97 (1976)) and in 1959 added the Labor Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1976)).

² The Act proscribes activities by unions and employees which it terms "unfair labor practice." National Labor Relations Act § 8(a), (b), 29 U.S.C. § 158(a), (b) (1976). These actions include, for example, discrimination based on union membership, 29 U.S.C. § 158(a)(3), (b)(2) (1976); refusal to bargain in good faith, *id.* § 158(a)(5), (b)(3); and restraint or coercion upon the right to join or not to join a union, *id.* § 158(a)(1), (b)(1).

³ National Labor Relations Act § 301, 29 U.S.C. § 185 (1976). This section was enacted to overcome the difficulties of enforcing collective bargaining agreements under state laws. Examples of state law barriers to enforcement were state regulations prohibiting suits against unions (instead requiring that all union members be joined as parties) and common law rules denying enforcement of executory promises to arbitrate. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 543-51 (1976)(discussion of evolution of § 301 and its role in enforcement of collective bargaining agreements). Section 301 provides in part:

(a) Suits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the

suits for damages caused by illegal boycotts.⁴ The 1947 amendment also provided a six-month statute of limitations for the filing of unfair labor practices complaints with the NLRB.⁵ The amendment did not, however, specify what time limitations, if any, applied to bringing the newly created private actions in federal court. A considerable amount of confusion has been caused by congressional silence on the issue of timeliness for these private actions. This paper will focus on that confusion and outline arguments for creating a uniform statute of limitations to be applied to these suits. A recent United States Supreme Court decision, *DelCostello v. International Brotherhood of Teamsters*,⁶ indicates that the Court is aware of the problems and is possibly willing to provide a solution.

I. THE GENERAL RULE FOR SUPPLYING PERIODS OF LIMITATION

It has long been accepted that when Congress creates a cause of action but is silent on the matter of timeliness for bringing the action, federal courts should "borrow" the most analogous state statute of limitations.⁷

parties.

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. National Labor Relations Act § 301, 29 U.S.C. § 185(a), (b)(1976).

⁴ See National Labor Relations Act § 303, 29 U.S.C. § 187 (1976)(allowing suits for damages caused by activities defined as unfair labor practices by § 8(b)(4) of the Act. Section 8(b)(4) of the Act proscribes secondary boycotts, recognition strikes, and work assignment strikes, making each an unfair labor practice. See National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4)(1976). Section 303 establishes that the same activity shall constitute a federal tort subject to damage suits in federal court as well as to NLRB actions. National Labor Relations Act § 303, 29 U.S.C. § 187 (1976).

⁵ National Labor Relations Act § 10(b), 29 U.S.C. § 160(b)(1976). Prior to the 1947 amendment, there was no limitations period for the filing of unfair labor practice charges.

⁶ 103 S. Ct. 2281 (1983).

⁷ The earliest reported case applying a state statute of limitations to a federal cause of action was *M'Cluney v. Silliman*, 28 U.S. (3 Pet.) 270 (1830). In that case, the Court applied Ohio's limitations period for actions of debt to a suit against a federal land registrar. *Id.* at 277; see also *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 397-98 (1906)(applied Tennessee statute of limitations for injuries to property in federal antitrust suit); *Campbell v. Haverhill*, 155 U.S. 610, 614-20 (1895)(applied Massachusetts limitations statute for tort suits to federal patent action). These early cases relied upon the Rules of Decision Act, 28 U.S.C. § 1652 (1976), which required federal courts to apply the laws of the several states in common-law actions. The Supreme Court has since interpreted the Rules of Decision Act to require the application of state statutes of limitation only when the state is the source of the substantive law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 72-73 (1938). *Erie* held that the Rules of Decision Act

*UAW v. Hoosier Cardinal Corp.*⁸ is illustrative of this general rule as applied in the labor context. Although the Court recognized that timeliness was clearly a matter of federal law, it looked to the most analogous state statute to supply the limitations period for an action on a collective bargaining agreement brought pursuant to section 301 of the National Labor Relations Act.⁹ The Court considered Indiana's statutes of limitation for written and for unwritten contracts, and applied the statute governing unwritten contracts as the appropriate analogue to collective bargaining agreements.¹⁰

II. EXCEPTIONS TO THE GENERAL RULE

The United States Supreme Court has, on rare occasions, declined to use state law to supply limitations periods for federal causes of action, in order to protect federal substantive rights. *McAllister v. Magnolia Petroleum Co.*,¹¹ a state court action, involved a claim for unseaworthiness under general maritime law and a claim for negligence¹² under the Jones Act.¹³ The state courts had held that the Texas two-year statute of limitations for personal injury¹⁴ barred the unseaworthiness claim.¹⁵ The doctrine of collateral estoppel required that the two claims be brought simultaneously,¹⁶ and thus, would have barred both

required application of state law in diversity cases, but not in cases where federal law controlled. *Id.* Federal courts, however, have continued to apply state limitation periods, relying only on "federal policy" and inertia. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 180-82 (1976)(applied state statute of limitations period to action under Civil Rights Act); Cope v. Anderson, 331 U.S. 461, 463-65 (1947)(applied state limitations period to action under National Bank Act); Swick v. Glen L. Martin Co., 68 F. Supp. 863, 864-69 (D. Md. 1946)(applied state statute of limitations period to action under Fair Labor Standards Act), *aff'd*, 160 F.2d 483 (4th Cir.), *cert. denied*, 332 U.S. 772 (1947). *See generally* Note, *Disparities in the Limitations on Federal Causes of Action*, 49 YALE L.J. 738, 738-45 (1940)(discussion of the doctrine of "borrowing" state statutes of limitation).

⁸ 383 U.S. 696 (1966).

⁹ *Id.* at 698.

¹⁰ 383 U.S. at 706. The Court reasoned that the statute of limitations for unwritten contracts should be applied instead of the rule for written contracts because proof of the breach of a written collective bargaining agreement and the measure of damages depend upon proof that a separate contract of employment, frequently oral, existed between the company and the individual employee. *Id.*

¹¹ 357 U.S. 221 (1958).

¹² *Id.* at 222.

¹³ 46 U.S.C. § 688 (1976).

¹⁴ Tex. Rev. Civ. Code Ann. art. 5526 § 6 (Vernon 1958).

¹⁵ *McAllister v. Magnolia Petroleum Co.*, 290 S.W.2d 313 (1956).

¹⁶ 357 U.S. at 225; *see* Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319 (1927)(judgment in action for unseaworthiness bars subsequent action under Jones Act for same

the Jones Act claim¹⁷ and the unseaworthiness claim, depriving the plaintiff of the full benefit of federal law.¹⁸ To avoid that result, the Court held that the state court could not limit the plaintiff's rights under the federal claim by applying a shorter statute of limitations to the corollary state claim.¹⁹

Another exception to the general rule of using state law to provide limitations periods for federal causes of action was created in *Occidental Life Insurance Co. v. EEOC*,²⁰ where the Court used a laches test to avoid restricting federal rights.²¹ In *Occidental Life*, after three years of investigation and conciliation efforts,²² the EEOC filed suit pursuant to Title VII of the Civil Rights Act of 1964.²³ The district court held the action to be barred²⁴ by a one-year California statute of limitations,²⁵ which was the longest of the potentially available state law limitation periods.²⁶ Affirming reversal by the Ninth Circuit,²⁷ the Supreme Court noted that "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state laws will not frustrate or interfere with the implementation of national policies."²⁸ The Court resolved the limitations problem by applying a test similar to the doctrine of laches, holding that if a Title VII defendant were prejudiced by a plaintiff's delay, then the federal courts could restrict or deny relief.²⁹

injuries).

¹⁷ 46 U.S.C. § 688 (1976)(incorporates the limitations on actions by railway employees, 45 U.S.C. § 56 (1976)).

¹⁸ 357 U.S. at 224-26. The Court stated that "[t]he appropriate period of limitations for this action must be determined with an eye to the practicalities of admiralty personal injury litigation." *Id.* at 224.

¹⁹ *Id.* at 225.

²⁰ 432 U.S. 355 (1977).

²¹ *Id.* at 373.

²² *Id.* at 357-58.

²³ 42 U.S.C. § 2000e-5 (1976).

²⁴ *EEOC v. Occidental Life Ins. Co.*, 12 Fair Empl. Prac. Cas. (BNA) 1298, 1299 (1974).

²⁵ CAL. CIV. PROC. CODE § 340(3)(West 1982)(action for injury to person).

²⁶ 432 U.S. at 358. The district court held that the claim was barred by the 180-day provision applicable to the filing of the charge, 42 U.S.C. § 2000e-5(f)(1)(1976), or, alternatively, by the one-year California statute of limitations for personal injuries. *EEOC v. Occidental Life Ins. Co.*, 12 Fair Empl. Prac. Cas. (BNA) 1298, 1299 (1974).

²⁷ *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533 (9th Cir. 1976).

²⁸ 432 U.S. at 367.

²⁹ *Id.* at 373. The Court rejected the proposition that the 180-day period was applicable to the filing of a civil suit. "[N]either 42 U.S.C. § 2000e-5(f)(1)(1976) nor any other

The ability of Congress itself to later supply statutes of limitations where none previously existed must also be noted. Congress appears to have supplied limitation periods when it has been dissatisfied with the limitations pronounced in court decisions.³⁰ An example of such Congressional action is the 1955 amendment to the Clayton Act providing for a four-year statute of limitations.³¹ Before the amendment, actions under the Clayton Act were governed by applying analogous state-law limitations periods,³² but the legislative history of the amendment shows that Congress found inherent problems in that procedure. The Senate report pointed out that the use of varying state statutes of limitation to govern the same collusive action is unfair to all parties.³³ A large-scale conspiracy could injure plaintiffs in many states, and while some of these plaintiffs' rights of action would be cut off by the legal statute after a relatively short time, the defendants would remain in constant jeopardy until the longest period expired.³⁴ Additionally, the

section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." 432 U.S. at 360.

The state limitations period was rejected because the state legislature could not have taken into account the national interest in having the EEOC conduct an informal investigation and make settlement efforts. *Id.* at 368. On the other hand, the Court noted that the EEOC should not be allowed to handicap the defendant by delaying filing once all conciliation efforts have been exhausted. Federal courts may therefore restrict or deny relief when a defendant would be prejudiced by unexcused delay. *Id.* at 373. *See generally* Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1141-46 (1979)(discussion of laches test in *Occidental Life*).

³⁰ *See, e.g.*, Act of March 3, 1897, ch. 391, § 6, 29 Stat. 694 (current version codified at 35 U.S.C. § 286 (1976))(added limitations period to Patent Act); *see also infra* notes 31-37 and accompanying text.

³¹ Act of July 7, 1955, ch. 283, § 69 Stat. 283 (codified at 15 U.S.C. § 15b (1976))(added limitation period for injuries caused by antitrust law violations).

³² *See, e.g.*, *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F. Supp. 333, 335 (N.D. Ala. 1960)(action arising before amendment took effect was subject to state limitations period); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 179 F. Supp. 163, 164-65 (S.D.N.Y. 1959)(same).

³³ S. REP. NO. 619, 84th Cong., 1st Sess., reprinted in 2 U.S. CODE CONG. & AD. NEWS 2328 (1955). The report states: "It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our federal laws." *Id.* at 2331.

³⁴ 2 U.S. CODE CONG. & AD. NEWS at 2330. The report illustrated this point in the following hypothetical:

A plaintiff located in State A who is injured by a conspiracy may find himself barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule. Where conspiracies occur on a nationwide level and it is determined that the limitation law of the place of injury governs the

report stated that courts were confused by conflicts of law questions in multi-state activities, and furthermore, that the determination of which of the several potentially applicable state statutes of limitation should apply to a particular federal cause of action was also a problem for federal courts prior to amendment of the Clayton Act.³⁵ Noting that "ancient common-law forms of action" did not parallel the federal antitrust suits,³⁶ the Senate report supported the passage of a uniform period of limitation.³⁷

III. DELCOSTELLO V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS: A STEP TOWARD UNIFORMITY OR MERELY ANOTHER EXCEPTION?

Because the National Labor Relations Act grants to duly certified labor organizations the right to exclusive representation of members in the bargaining unit,³⁸ federal courts have found that such organizations owe to each member a duty to provide fair representation.³⁹ The courts have ruled that if this duty is breached, the member has an implied private right of action against his union which may be pursued in fed-

case, a plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired.

Id. at 2330-31.

³⁵ *Id.* at 2331.

³⁶ *Id.* The federal policy of borrowing the most analogous state statute of limitations, *see supra* note 7, obviously posed a peculiar problem in cases where there was no state law analogue. The report stated that actions such as trespass and actions on the case were not appropriate to govern federal antitrust suits. *Id.*

³⁷ *Id.* at 2333.

³⁸ National Labor Relations Act § 9(a), 29 U.S.C. § 159(a)(1976). Once a union is selected as the representative of a bargaining unit, it becomes the exclusive representative of all employees in that unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* See generally R. GORMAN, BASIC TEXT ON LABOR LAW 375-76 (1976)(§ 9(a) mandates that employer bargain with representative of employees and that employer not bargain with anyone else; for example, employer is not allowed to bargain with individual employees).

³⁹ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). There is no express statutory provision requiring fair representation. Rather, the exclusivity provision implicitly requires the union to "make an honest effort to serve the interest of all [union] members without hostility to any." *Id.* at 337. This concept was developed to protect the individual union members from arbitrariness, discrimination, and hostility on the part of union representatives. See, e.g., *Black Musicians of Pittsburg v. American Federation of Musicians*, 375 F. Supp. 902, 910 (W.D. Penn. 1974)(suits alleged racial discrimination by union in hiring and job referral). See generally C. MORRIS, I THE DEVELOPING LABOR LAW 1285-92 (2d ed. 1983)(discussing origin and development of duty of fair representation).

eral district court.⁴⁰ Such a claim would usually arise if an employer had violated the collective bargaining agreement with respect to an employee and the union had failed adequately to pursue a remedy in the employee's behalf.⁴¹ The employee would have been harmed both by the employer's denial of a contractual right and by the union's wrongful handling of the grievance. Since a proportional allocation of damages would be required,⁴² a claim for breach of the duty of fair representation would virtually always be brought simultaneously with a section 301 suit against the employer for breach of the collective bargaining agreement.⁴³ Such dual-claim lawsuits are commonly known as "hybrid" section 301/breach of duty of fair representation actions.

From their beginning, these hybrid suits have presented unique problems with respect to determining the applicable statute of limitations.⁴⁴ Some courts treated the two claims independently, applying a

⁴⁰ See *Vaca v. Sipes*, 386 U.S. 171, 176-77 (1967) (federal courts have power to hear duty of fair representation suits and their jurisdiction is not preempted by NLRB). When a breach of duty of fair representation action is joined with a suit against an employer for breach of the collective bargaining agreement, see *infra* notes 41-44 and accompanying text, jurisdiction is derived from § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976). If the action alleges only the union's breach of its duty of fair representation, jurisdiction is derived from 28 U.S.C. §§ 1331, 1337 (1976), which grants to federal courts jurisdiction over civil actions arising under federal laws, and over actions arising under federal statutes regulating commerce. See, e.g., *Nedde v. Mine Workers*, 556 F.2d 190, 203-06 (3d Cir. 1977) (when no breach of contract exists, jurisdiction is based not on § 301 but on 28 U.S.C. §§ 1331, 1337 (1976)), *cert. denied*, 434 U.S. 1013 (1978).

⁴¹ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 174-76 (1967) (employee discharged due to poor health; union refused to seek arbitration); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 388 (6th Cir. 1975) (employee discharged for intoxication on job and abusive language; union failed to process grievance).

⁴² The union would not be liable for damages caused by the employer's breach of the collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 195-98 (1967). The union may be held liable only for those damages caused by its mishandling of or failure to process the grievance. See, e.g., *Czosek v. O'Mara*, 397 U.S. 25, 28-29 (1970) (union liable only to extent that its refusal to handle grievance resulted in difficulty and expense in collecting from employer); *Thompson v. Sleeping Car Porters*, 367 F.2d 489, 492-93 (4th Cir. 1966) (employee who lost job due to union's breach of duty recovered resulting lost pay from union), *cert. denied* 386 U.S. 960 (1967).

⁴³ See *supra* note 41 for examples.

⁴⁴ See generally Survey, *Labor Policy and Labor Peace: A Survey 1979-1982—Section 301 and the Enforcement of Collective Bargaining Agreements in the Sixth Circuit*, 13 U. Tol. L. Rev. 763, 768-78 (1982) (explaining that district courts within the Sixth Circuit were not consistent in characterizing hybrid suits); Comment, *Statute of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer*, 44 GEO. WASH. L. REV. 418, 435 (1976) (proposed that statute for breach of contract should be uniformly applied to eliminate confusion).

state statute of limitations for contracts to the claim against the employer and a state statute of limitations for torts to the breach of duty of fair representation claim.⁴⁵ Other courts, having determined that the same limitations period should apply to both claims, differed as to the appropriate characterization of the entire action.⁴⁶

The problem of determining the proper limitations period for these hybrid suits was resolved in 1983 by the United States Supreme Court in *DelCostello v. International Brotherhood of Teamsters*.⁴⁷ In *DelCostello* the Court determined that lower courts should no longer look to state law to provide a statute of limitations for these hybrid suits, but instead should apply the same limitations period that Congress has provided for the filing of unfair labor practice charges with the NLRB.⁴⁸ Because this case sheds a considerable amount of light on the need for uniformity, and because the principles expressed therein could easily apply to section 301 and section 303 suits, *DelCostello* warrants close examination.

DelCostello was a consolidation of two suits on appeal. In the first case, Phillip DelCostello had filed a hybrid suit in federal district court alleging that his employer had discharged him in violation of the collective bargaining agreement and that his union had breached its duty of fair representation in the handling of the grievance procedure relevant to the discharge.⁴⁹ The court overruled motions that the action

⁴⁵ See, e.g., *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973)(applied Alabama's one-year tort statute to claim against union); *DeArroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir.)(applied Puerto Rico's tort statute to cut off claim against union, but allowed action against employer to stand), *cert. denied*, 400 U.S. 877 (1970).

⁴⁶ See, e.g., *Gallagher v. Chrysler Corp.*, 613 F.2d 167, 169 (6th Cir.)(held same limitations period should apply to both claims and characterized actions as most analogous to damage claims for injury to person or property), *cert. denied*, 449 U.S. 841 (1980); *Warren v. International Bhd. of Teamsters*, 544 F.2d 334, 337 (9th Cir. 1976)(applied limitations period for breach of written contracts to both claims); *Butler v. Local 823, International Bhd. of Teamsters*, 514 F.2d 442, 448 (9th Cir.)(same), *cert. denied*, 423 U.S. 924 (1975); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251-53 (2d Cir.)(applied New York's statute of limitations for actions on "contractual obligation or liability express or implied" to both claims), *cert. denied*, 401 U.S. 1009 (1970).

⁴⁷ 103 S. Ct. 2281 (1983).

⁴⁸ *Id.* at 2293-94. Section 10(b) of the National Labor Relations Act provides that unfair labor practice charges must be filed within six months. 29 U.S.C. § 160(b)(1976).

⁴⁹ *DelCostello v. International Bhd. of Teamsters*, 510 F. Supp. 716 (D. Md. 1981). *DelCostello* had been assigned to transport a load of new automobiles from Baltimore to Montreal. Upon inspection of the assigned tractor-trailer, he concluded that it was in need of repair and would be unsafe to drive. When company efforts to repair the truck did not meet his satisfaction, *DelCostello* refused to drive the truck, and his employment

was barred by the running of the statute of limitations,⁵⁰ holding that Maryland's three-year statute for actions on contracts⁵¹ applied. After the United States Supreme Court decided *United Parcel Service, Inc. v. Mitchell*,⁵² holding that courts should apply the state timeliness rule for vacation of arbitration awards in hybrid cases,⁵³ the lower court in *DelCostello* reconsidered and granted summary judgment for the union and employer.⁵⁴ The Court of Appeals for the Fourth Circuit affirmed.⁵⁵

In the second of the two cases consolidated for the *DelCostello* appeal, *Flowers v. Local 2602*,⁵⁶ two employees filed grievances complaining that certain work assignment procedures had deprived them of employment.⁵⁷ After an arbitrator ruled against them, they filed a

service with the company was regarded as ended. The union processed *DelCostello*'s grievance through to arbitration, and an arbitration panel upheld the termination. *Id.* at 718.

⁵⁰ *Id.* at 720. Both the union and the employer had argued that the statute for vacation of arbitration awards should apply to the claims. *Id.* The court rejected this motion based on the Second Circuit's decision in *Mitchell v. United Parcel Serv.*, 624 F.2d 394 (2d Cir. 1980), holding that the contract statute applied. *DelCostello*, 510 F. Supp. at 720.

⁵¹ MD. CTS. & JUD. PROC. CODE ANN. § 3-224 (1980).

⁵² 451 U.S. 56 (1981).

⁵³ *Id.* at 60-64. In *Mitchell*, the employee had been discharged for dishonest acts, which he denied. The union processed the grievance through to arbitration where a decision against *Mitchell* was reached. Sixteen months later, *Mitchell* filed suit alleging that the true reason that he was fired was to hire part-time replacements, which constituted a breach of the labor contract by the employer. *Mitchell* also sued his union for breach of its duty of fair representation. *Id.* at 58-59. The district court held that both actions were governed by New York's statutes of limitations for vacation of arbitration awards. *Id.* at 59. The Court of Appeals for the Second Circuit reversed, holding that the district court should apply the statute of limitations for actions on contracts to both of the claims. *Mitchell v. United Parcel Serv.*, 624 F.2d 394, 398 (2d Cir. 1980). On appeal, the Supreme Court reversed, noting that the same issues would be raised in court as were raised in arbitration, and that the same relief would be requested. The Court held that since the plaintiff must first prove that the union represented him unfairly before the merits of the contract claim could be reached, the suit was most analogous to an action to vacate an arbitration award. 451 U.S. at 60-62. The Court also relied on the strong federal policy in favor of the rapid resolution of labor disputes and stated that industrial self-government would become unworkable if decisions could be called into question as much as six years later, which might have been the case under the contracts statute. *Id.* at 63.

⁵⁴ 524 F. Supp. 721 (D. Md. 1981).

⁵⁵ 679 F.2d 879 (4th Cir. 1982).

⁵⁶ 105 L.R.R.M. (BNA) 2299 (W.D.N.Y. 1979).

⁵⁷ *Id.* The employees claimed they were "laid off" for several months due to violations by the employer of the collective bargaining agreement. *Id.*

hybrid section 301/breach of duty of fair representation claim against the employer and the union in federal district court.⁵⁸ The district court held that New York's ninety-day statute of limitations for actions to vacate arbitration awards⁵⁹ was applicable, and dismissed the actions.⁶⁰ The Court of Appeals for the Second Circuit reversed in a memorandum opinion,⁶¹ but the Supreme Court vacated and remanded, directing the court of appeals to reconsider in light of *Mitchell*.⁶² The court of appeals then applied the vacation of arbitration awards statute to the claim against the company, but applied New York's three-year limitations period for legal malpractice⁶³ to the claim against the union.⁶⁴

DelCostello and the defendants in *Flowers* petitioned for certiorari, which was granted,⁶⁵ and the cases were consolidated for argument.⁶⁶ In the *DelCostello* opinion, the Court began by noting that in *Mitchell* only the employer had sought certiorari. The Court questioned whether application of the ruling to unions in hybrid section 301/breach of duty of fair representation cases had been unnecessary.⁶⁷

⁵⁸ *Id.* The employees claimed that the union "presented their grievances so negligently as to amount to an arbitrary and capricious failure to present their arguments." *Id.*

⁵⁹ N.Y. CIV. PRAC. LAW § 7511(a)(McKinney 1972).

⁶⁰ 105 L.R.R.M. (BNA) at 2300. The court reasoned that the limitations period for vacation of arbitration awards was most analogous because before relief could be granted, the arbitration award would have to be overturned. The district court declined to follow the Second Circuit's previous decision in *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), wherein New York's statute of limitations for contracts applied in a hybrid suit. The *Flowers* court distinguished *Abrams* on the ground that there had been no arbitration in *Abrams*. 105 L.R.R.M. (BNA) at 2300.

⁶¹ *Flowers v. Local 2602*, 622 F.2d 573 (2d Cir. 1980). Apparently, reversal was on the basis of the prior holding of the Court of Appeals for the Second Circuit in *Mitchell*, wherein it held that New York's six-year statute for actions on contracts, N.Y. CIV. PRAC. LAW § 213(2)(McKinney 1972), governed the hybrid claims.

⁶² 451 U.S. 965 (1981).

⁶³ N.Y. CIV. PRAC. LAW § 214(6)(McKinney 1972).

⁶⁴ *Flowers v. Local 2602*, 671 F.2d 87, 90-91 (1982). Noting that only the employer had sought certiorari in *Mitchell*, the court declined to apply the vacation of arbitration awards statute to the claim against the union, disregarding as dictum any language to the contrary in *Mitchell*. *Id.* at 90. The court was persuaded by Justice Stevens' reasoning in his opinion concurring in part and dissenting in part in *Mitchell*, 451 U.S. 56, 71 (1982), that the claim against the union was most analogous to a state action for legal malpractice. 671 F.2d at 90-91.

⁶⁵ 103 S. Ct. 442 (1982).

⁶⁶ 103 S. Ct. 2287 (1983).

⁶⁷ *Id.* at 2285 & n.1.

Further, the parties in *Mitchell* had not presented the issue of applying the six-month statute of limitations for the filing of unfair labor practice charges found in section 10(b) of the National Labor Relations Act, relying instead upon the applicable state law.⁶⁸ With these two issues satisfactorily presented in the consolidated appeal, the Court was poised for a thorough examination of the potentially applicable statutes of limitations to apply in the hybrid suits.

The *DelCostello* Court immediately distinguished *Hoosier*, noting that *Hoosier* had involved a simpler and more straightforward breach of contract under section 301, and that such cases were closely analogous to state suits in contract law.⁶⁹ The Court then rejected the analogy of *Mitchell*⁷⁰ which stated that hybrid section 301/breach of duty of fair representation suits resembled actions to vacate arbitration awards. This analogy was found to be "imperfect in operation" in regard to the claim against the employer. The Court based this finding primarily on the following differences in hybrid suits and vacation of arbitration suits: the repetitive nature of a suit to vacate arbitration awards, not present in hybrid suits; the relative sophistication of parties to commercial arbitration as compared to labor grievants; and the greater length of time needed by a labor grievant to evaluate the adequacy of his representation.⁷¹ For the claim against the union, *Mitchell*'s analogy was said to be "problematic," because the employee's claim against the union would not have been an issue in the arbitration hearing.⁷²

Additionally, the Court in *DelCostello* was unpersuaded by Justice Stevens' position that the breach of duty of fair representation claim should be governed by state-law legal malpractice limitations.⁷³ Although admitting that the analogy was good,⁷⁴ the Court noted that because the union could be held liable only for exacerbating the employee's damages, the employee would still be barred from recovering the principal damages unless he filed suit within the much shorter time

⁶⁸ *Id.* at 2285.

⁶⁹ *Id.* at 2289-90. See *supra* notes 8-10 and accompanying text for a brief discussion of *Hoosier*.

⁷⁰ 451 U.S. 56 (1981); see *supra* notes 52-53 and accompanying text.

⁷¹ 103 S. Ct. at 2291.

⁷² *Id.* at 2291-92.

⁷³ *Id.* at 2292-93; see *Mitchell*, 451 U.S. 56, 74 (1981) (Justice Stevens arguing that state statute for legal malpractice should apply to claim against union). Justice Stevens argued in *DelCostello* for the application of the legal malpractice statute, generally three to six years, to the claim against the union. 103 S. Ct. 2295 (Stevens, J., dissenting).

⁷⁴ See *supra* note 64.

period applicable to the claim against the employer.⁷⁶

Finally, having considered what statutes should not be applied, the Court concluded that section 10(b) of the National Labor Relations Act is the proper statute to be used in the private hybrid actions.⁷⁶ The Court found that unfair labor practice charges, to which section 10(b) applies, are more analogous to the hybrid actions than any of the suggested state-law actions, noting that the NLRB has considered breaches of the union's duty of fair representation to be unfair labor practices.⁷⁷ In addition to observing the similarity of the actions, the Court found that the policy behind the six-month limit of section 10(b) for bringing unfair labor practice charges is based upon the same considerations that should govern the time limitation for bringing private hybrid actions.⁷⁸ In other words, section 10(b) was specifically designed to properly limit a cause before the NLRB which was in practical respects the same as the private hybrid causes before the courts.⁷⁹

The ramifications of *DelCostello* are difficult to gauge. Clearly the question of timeliness for the bringing of hybrid suits has been resolved, but an additional question remains: Will the reasoning of *DelCostello* be extended to causes of action under section 301 and section 303, and if so, under what circumstances? *DelCostello* contains a rather strong indication that its break from the general rule of borrowing statutes of limitation from state law is to be limited to hybrid cases.⁸⁰

In the same paragraph, however, the Court outlined what appears to be a two-part test for determining the circumstances in which deviation from the general rule would be appropriate. The Court determined

⁷⁶ 103 S. Ct. at 2292.

⁷⁷ *Id.* at 2293-95.

⁷⁷ *Id.* at 2293. The Court cited *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), as an example of the NLRB's holding that breach of the duty of fair representation is an unfair labor practice. 103 S. Ct. at 2293.

⁷⁸ 103 S. Ct. at 2293-94. See generally R. GORMAN, *supra* note 3, at 729-34 (discussing overlap between breaches of collective bargaining agreements and unfair labor practices).

The Court noted that § 10(b) was drafted with an eye toward the proper balance between the national interests in stable bargaining relationships and finality of private settlements. This made the statute a "significantly more appropriate vehicle for interstitial lawmaking" than state statutes. 103 S. Ct. at 2294.

⁷⁹ 103 S. Ct. at 2293-94.

⁸⁰ *Id.* at 2294. The Court stated that "[w]e stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere [R]esort to state law remains the norm for borrowing of limitations periods." *Id.*

that state-law rules of limitation should not be used if (1) a federal rule providing a better analogy could be borrowed *and* (2) the available federal rule would be significantly more suitable because of underlying federal policies.⁸¹ The Court had implied earlier that in a "pure" section 301 action, section 10(b) would provide an appropriate limitations period,⁸² and upon application of the two-part standard, actions under both section 301 and section 303 would appear to call for borrowing the rule of section 10(b). Perhaps *DelCostello* is a step toward uniformity of limitations periods in private actions under the National Labor Relations Act.

IV. THE ARGUMENT FOR EXTENDING DELCOSTELLO'S RATIONALE TO ACTIONS UNDER SECTIONS 301 AND 303

A. *The Problem of Characterization: Deciding Which State Statute to Apply*

Sections 301 and 303 of the National Labor Relations Act authorize suits that are distinctly different from those available under state law. Although at first glance section 301 actions may resemble common-law breach of contract suits, and section 303 suits may appear comparable to certain tort claims, a closer look reveals some major differences. In both section 301 and section 303 suits, the United States Supreme Court has mandated substantive uniformity,⁸³ disregarding

⁸¹ *Id.* The Court said that state law would not be borrowed if "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making . . ." *Id.*

⁸² *Id.* at 2287 n.12. The Court considered the fact that hybrid actions are based in part on an implied cause of action and, since Congress could not have intended that state law be followed, hybrid actions might therefore be more appropriate for the borrowing of federal rules of limitations. The Court stated, however, that "even if this action were considered as arising solely under § 301, the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule." 103 S. Ct. at 2287 n.12.

⁸³ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). *Lincoln Mills* held that § 301 provided more than a procedural vehicle by which breach of contract actions could be brought in federal court. 353 U.S. at 450-51. The Court found that Congress had intended the federal courts to fashion an independent body of law to govern collective bargaining agreements under the National Labor Relations Act. State law, if compatible, was to be applied only if it would effectuate the policies of the Act. "Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Id.* at 457; *see also* *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 261 (1964) (when local law frustrates policies of Act, incompatible doctrines must yield to supreme principles of federal labor law).

the notion that state law is controlling,⁸⁴ and authorizing federal courts to create a body of "federal common law" to govern the suits,⁸⁵ resulting in the preemption of state-law principles.⁸⁶ However, notwithstanding this preemption, federal courts have continued to borrow state limitations periods in section 301 and section 303 actions.⁸⁷ The borrowing of a state statute of limitations involves the problem of trying to characterize the federal actions in order to determine the closest analogy in state law. This effort to fit the federal action into a state-law mold is difficult at best. That difficulty compellingly supports a change in the rule.

1. Section 301 Actions

In attempting to characterize section 301 actions, *Hoosier*, a case concerning a breach of collective bargaining agreements, held that the applicable state law analogue was a six-year limitations period for actions on unwritten contracts.⁸⁸ The parties had also argued that the Court should apply the twenty-year statute for actions on written contracts,⁸⁹ or that the courts should create a uniform limitations period applicable to all section 301 actions.⁹⁰ The Court held that the characterization of federal actions for the purpose of determining which state statute of limitations to apply was a question of federal law, but that the state court's characterization need not be rejected so long as national labor policies were not frustrated.⁹¹

Hoosier has failed, however, to provide any consistency, even for section 301 actions. The breach in *Hoosier* was the termination of several employees without payment of accumulated vacation pay as provided in the collective bargaining agreement.⁹² Only after careful anal-

⁸⁴ *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

⁸⁵ 353 U.S. at 457.

⁸⁶ 377 U.S. at 258; 353 U.S. at 457.

⁸⁷ See *infra* notes 88-102, 106 and accompanying text.

⁸⁸ 383 U.S. at 707-08; see *supra* notes 8-10 and accompanying text.

⁸⁹ IND. STAT. ANN. § 34-1-2-2 (Burns 1971).

⁹⁰ 383 U.S. at 701. Both parties argued for the creation of a uniform limitations period. Brief for Petitioner at 16 L. Ed. 2d 1140, *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); Brief for Respondent at 16 L. Ed. 2d 1141, *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Only the company, however, requested a specific time period—the six-month period from § 10(b). Brief for Respondent at 16 L. Ed. 2d 1141, *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

⁹¹ 383 U.S. at 706-07.

⁹² *Id.* at 698.

ysis of the interests⁹³ involved in that particular type of breach did the Court note that other cases arising under section 301 might require application of a different state-law analogue.⁹⁴ One example of such a case would be an action brought to enforce or vacate a grievance arbitrator's award. In this type of action courts have generally applied the much shorter state statute of limitations pertaining to commercial arbitration awards.⁹⁵ But at least one court has disagreed, preferring instead to apply a contract statute even though the purpose of the suit was to overturn an arbitrator's award.⁹⁶ Another possibility for those states that do not have statutes governing vacation of arbitration awards is to borrow the limitations period provided in the Federal Arbitration Act.⁹⁷

An additional problem in characterizing section 301 suits is presented in *Allen v. McWilliams Electric Co.*⁹⁸ In *Allen*, the trustees of the employee benefit fund sued the employer for payment of contributions due under the collective bargaining agreement. The court was faced with the same dilemma that had been addressed in *Hoosier* — whether to apply the statute of limitations governing unwritten con-

⁹³ *Id.* at 706-08. In choosing the six-year statute pertaining to unwritten contracts instead of the 20-year period governing written contracts, the Court considered that by enacting a six-month limitations period for unfair labor practice charges, Congress had expressed an interest in the speedy resolution of labor disputes. Despite the Court's statement that proof of liability would be contingent upon a finding that a separate, individual employment contract existed, the rights at issue were nevertheless under the written collective bargaining agreement. Even though the separate employment contract was probably oral, the written collective bargaining agreement would not be limited by the term of the separate employment contract. *Id.* at 706-07; see *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (individual contracts do not impair collective bargaining agreements). It would seem that if the Court were only interested in adopting state-law characterization, it would have applied the statute of limitations applicable to written contracts.

⁹⁴ 383 U.S. at 705 n.7.

⁹⁵ *E.g.*, *DeLorto v. United Parcel Serv.*, 401 F. Supp. 408, 409 (D. Mass. 1975) (applied Massachusetts' 30-day limitation period for vacation of arbitration awards to § 301 suit in overruling arbitrator); *United Mine Workers v. Jones & Laughlin Steel Corp.*, 378 F. Supp. 1206, 1211 (W.D. Pa. 1974) (applied Pennsylvania's three-month limitation on appeals from arbitration awards to § 301 suit to vacate arbitration award).

⁹⁶ *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 219 (6th Cir. 1978). In *Smart*, the court held that the § 301 suit was independent of the grievance process; therefore, the appropriate limitations period was provided by the statute governing injuries to person or property and not by the statute governing vacation of arbitration awards. 580 F.2d at 219.

⁹⁷ *E.g.*, *Derwin v. General Dynamics Corp.*, 551 F. Supp. 1128 (D. Mass. 1982) (applied one-year limitations period from Federal Arbitration Act, 9 U.S.C. § 9 (1976)).

⁹⁸ 494 F. Supp. 53 (N.D. Ill. 1980).

tracts or that governing agreements in writing.⁹⁹ Unlike *Hoosier*, however, the plaintiffs were identified in the contract,¹⁰⁰ so it was not necessary to prove the existence of separate oral hiring contracts in order to establish the applicability of the written collective bargaining agreement.¹⁰¹ Under these circumstances the court applied the statute for written contracts.¹⁰²

These artificial distinctions and the resulting confusion could hardly be the type of "judicial inventiveness" the Supreme Court had in mind in *Textile Workers Union v. Lincoln Mills*,¹⁰³ when it demanded uniformity in the labor law field.¹⁰⁴ Nevertheless, this myriad of potentially applicable statutes of limitations for section 301 actions exists, demonstrating the need for a uniform statute to be applied to section 301 suits.

2. Section 303 Actions

Characterization has been no easier in section 303 suits. The United States Supreme Court has not ruled on the appropriate characterization for a suit brought under section 303, so this issue is the source of much confusion in the lower federal courts. Some courts characterize the action as similar to a tort action,¹⁰⁵ while others recognize the same suit as having no state-law counterpart and apply the state's limitations period for liability imposed by statute.¹⁰⁶

⁹⁹ *Id.* at 55-56; see 383 U.S. at 705-06 (discussion regarding which state contract limitations period applied).

¹⁰⁰ In *Hoosier*, the contractual clause referred only to "[e]mployees who qualify for a vacation in the previous year and whose employment is terminated for any reason before the vacation is taken . . .," 383 U.S. at 698, thus requiring proof that the oral employment contract existed. 383 U.S. at 698. In *Allen*, the employer agreed to contribute directly to the fund, so the trustees became, in effect, third party beneficiaries of the collective bargaining agreement. 494 F. Supp. at 55.

¹⁰¹ 494 F. Supp. at 55.

¹⁰² *Id.* at 55-57; see also *Paul v. Lindgren*, 375 F. Supp. 843, 851 (N.D. Ill. 1974)(in a factual situation similar to that in *Allen*, court applied statute governing written contracts).

¹⁰³ 353 U.S. 448 (1957). The Court ruled that when the labor statutes were silent, federal courts should use "judicial inventiveness" to remedy any problems. *Id.* at 457.

¹⁰⁴ See *supra* notes 83-85 and accompanying text.

¹⁰⁵ *E.g.*, *Railing v. United Mine Workers*, 429 F.2d 780, 781-82 (4th Cir. 1970)(applied tort statute to § 303 suit), *vacated*, 401 U.S. 486 (1971); *American Sink Top Co. v. Carpenters Union*, 100 L.R.R.M. (BNA) 2894, 2894-95 (N.D. Cal. 1979)(same).

¹⁰⁶ *E.g.*, *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065*, 430 F.2d 1119, 1120-21 (9th Cir. 1970)(applied limitations period for liability created by statute to § 303 claim); *Peterson v. Musicians Local 802*, 82 L.R.R.M. (BNA) 2144, 2145-46 (S.D.N.Y. 1972)(same).

Another problem with the characterization of section 303 suits evolves from the statutory language. The statute contains some confusing language which indicates, in effect, that the same limitations that apply to section 301 suits also apply to section 303 suits.¹⁰⁷ Although legislative history indicates that this language is not in reference to temporal limitations,¹⁰⁸ some courts have interpreted it that way.¹⁰⁹

B. *The DelCostello Rationale and Sections 301 and 303*

The Court's rationale in *DelCostello*, in deciding to apply the six-month rule of section 10(b) to hybrid actions, is applicable to both section 301 and section 303 actions. The Supreme Court has spoken of the "family resemblance" between section 303 actions and unfair labor

¹⁰⁷ Section 303 states:

Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title [§301] hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

National Labor Relations Act § 303(b), 29 U.S.C. § 187(b)(1976).

¹⁰⁸ The legislative history indicates that the "limitations" language in § 303(b) is in reference to enforceability of judgments against unions and to the courts' jurisdiction over unions. During Senate debate, Senator Morse objected to the Taft amendment which became § 303, because it

is inconsistent with the present provision in the bill allowing a union to be sued for breach of contract. Section 301 of the bill permits suits against labor organizations only, whereas the substitute proposal allows damage suits against "any person." Also Section 301 limits the recovery to the assets of the union. The substitute allows the attachment of employees' bank accounts and all of their property.

93 Cong. Rec. 5042 (1947), reprinted in II LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1358 (1948).

The "limitations" language represented the legislators' attempt to deal with this criticism. The subsequent House Conference Report on the Taft-Hartley Act stated:

Section 303 of the Senate amendment contained a provision . . . to give persons injured by boycotts . . . a right to sue the labor organization responsible therefore in any district court of the United States (subject to the limitations and provisions of the section dealing with suits by and against labor organizations . . .). The conference agreement adopts the provisions of the Senate amendment with clarifying changes.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. at 67 (1947), reprinted in I *Legislative History of the Labor Management Relations Act* 571 (1948).

¹⁰⁹ See, e.g., *Carruthers Ready-Mix v. Cement Masons*, 113 L.R.R.M. (BNA) 2077, 2079 (W.D. Tenn. 1983) (holding that § 303 actions are governed by same statute of limitations as § 301 suits).

practice charges.¹¹⁰ Under that analogy, the full contingent of private causes of action under the National Labor Relations Act would fit the unfair labor practices mold and be ripe for the application of the section 10(b) six-month limitation period.

Substantial overlap exists between conduct subject to a section 301 action and conduct governed by the NLRB's jurisdiction to process unfair labor practice charges, subject to section 10(b)'s limitations. For example, unilateral changes in mandatory subjects of collective bargaining such as pay rates or working conditions, made while a collective bargaining agreement was in force, would likely violate not only the terms of that agreement but also the statutory duty to bargain.¹¹¹ The action would be subject to a section 301 suit or an unfair labor practice charge.¹¹² Other examples of potential overlap are failure to disclose information¹¹³ and discriminatory discharge.¹¹⁴ The United States Supreme Court has acknowledged that such overlap exists, and in *Smith v. Evening News Ass'n*,¹¹⁵ the Court held that neither the NLRB nor the courts would be deprived of jurisdiction merely because

¹¹⁰ 103 S. Ct. at 2293.

¹¹¹ *E.g.*, NLRB v. Katz, 369 U.S. 736, 742-43 (1962)(unilateral changes during course of collective bargaining agreement regarded as per se unfair labor practices). 29 U.S.C. § 158(d)(1976) provides that parties have a mutual obligation to confer in good faith with respect to wages, hours, "and other terms and conditions of employment." Sections 158(a)(5) and (b)(3) make noncompliance with § 158(d) an unfair labor practice. See generally C. MORRIS, I THE DEVELOPING LABOR LAW 563-66 (2d ed. 1983).

¹¹² See, *e.g.*, NLRB v. C & C Plywood Corp., 385 U.S. 421, 425-31 (1967)(Board is not deprived of jurisdiction to process § 8(a)(5) unfair labor practice charges merely because dispute arises from contractual interpretation).

¹¹³ See NLRB v. Acme Indus. Co., 385 U.S. 432, 435-38 (1967). In *Acme*, the employer had refused to provide information that the Union deemed necessary to process a grievance. *Id.* at 434-35. Relying on NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956), which held that the bargaining representative had a right to information necessary for the proper performance of its duties, the Board issued an unfair labor practice complaint. 385 U.S. at 435-36. The Court of Appeals for the Seventh Circuit refused to enforce the Board's order, ruling that the Board was preempted by the contractual grievance arbitration machinery, which may be a substitute for and sometimes a prologue to a § 301 suit. *Acme Indus. Co. v. NLRB*, 351 F.2d 258, 260-61 (7th Cir. 1965). The Supreme Court reversed, holding that the Board might hear such cases, despite their being premised upon contract terms. 385 U.S. at 437-38.

¹¹⁴ In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), the collective bargaining agreement contained a clause stating that there would not be any discrimination because of union membership. The employer allegedly assigned work in a discriminatory manner, and was required to defend a § 301 suit in federal court and an unfair labor practice charge before the National Labor Relations Board pursuant to § 8(a)(3) of the NLRA. 371 U.S. at 197.

¹¹⁵ 371 U.S. 195 (1962).

the underlying activity had been both an unfair labor practice and a breach of a collective bargaining agreement.¹¹⁶ Although the breach in other cases may not facilitate such a convenient comparison with unfair labor practice charges as did the breach in *Evening News*, the "family resemblance" rationale seems generally to apply with full force.¹¹⁷

The comparison between a section 303 suit and an unfair labor practice charge produces an even stronger parallel because an unlawful boycott is by statute an unfair labor practice;¹¹⁸ therefore, the event giving rise to a section 303 suit would always justify an unfair labor practice charge. The difference between an unfair labor practice charge based on the section 8(b)(4) proscription of unlawful boycotts and a section 303 suit is that in the former the exclusive remedy is most often an injunction,¹¹⁹ while in the latter only damages are available.¹²⁰ Thus, applying the "family resemblance" rationale, section 303 suits and unfair labor practice charges are virtually twins.

¹¹⁶ *Id.* at 197. The Court stated the following:

The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301.

371 U.S. at 197.

¹¹⁷ The legislative history makes clear that not all breaches of collective bargaining agreements constitute unfair labor practices. An early proposal included a provision that expressly provided that breaches of collective bargaining agreements were unfair labor practices. S. 116, 80th Cong., 1st Sess., I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 109-11, 114. Although this provision was not enacted into law, it cannot be denied that breaches of labor agreements violate the basic purposes of the Act, *i.e.*, prevention of industrial unrest and the assurance of worker rights. See 29 U.S.C. § 151 (1976) (stating the "findings and declaration of policy" for the Labor Act).

¹¹⁸ 29 U.S.C. § 187(a)(1976). "It shall be unlawful, for the purpose of this section only, in industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) [unlawful boycotts of the National Labor Relations Act, as amended]." 29 U.S.C. § 187(a)(1976).

¹¹⁹ National Labor Relations Act § 10(1), 29 U.S.C. § 160(1)(1976). Upon investigation of an unfair labor practice charge, the Board's regional officer may petition any United States district court for injunctive relief pending final adjudication by the Board. *Id.* After determination on the merits, the Board has the authority to issue a cease and desist order. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c)(1976). This order may be enforced in federal courts. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e)(1976).

¹²⁰ National Labor Relations Act § 303(b), 29 U.S.C. § 187(b)(1976).

C. *The National Interest in Uniformity*

In addition to the problems encountered by trying to match federal statutory causes of action with state-law actions to discern the proper state-law limitations period to borrow, independent national policy considerations favor the adoption of the section 10(b) six-month limitation in private causes of action under the National Labor Relations Act. These national interests, coupled with the compelling similarities between unfair labor practice charges and private labor actions, illustrate the basic rationale behind adopting a uniform statute of limitations for the private actions.

The federal labor laws were enacted for the purpose of stabilizing and facilitating industrial relationships in a predominately interstate economy.¹²¹ That purpose is not fostered by a rule which makes enforcement of the laws different across every state line. *Textile Workers Union v. Lincoln Mills* explained that substantive questions not expressly addressed in the Act should be answered not by relying on state law, but "by looking at the policy of the legislation and fashioning a remedy that will effectuate the policy. The range of judicial inventiveness will be determined by the nature of the problem."¹²² Borrowing a federal statute of limitations which was drafted to deal with the same considerations that are present in private actions would seem to be appropriate under the teachings of *Lincoln Mills*. Moreover, little favor can be found in borrowing state law that, as the Supreme Court noted in *Occidental Life*, was not drafted with national policies in mind or at stake.¹²³

Hoosier is significant because it is a case in which the Court declined to inject uniformity into federal labor law. In *Hoosier* the Court refused to apply the section 10(b) six-month limit. The Court reasoned that the need for uniformity is created when the "consensual

¹²¹ National Labor Relations Act § 1, 29 U.S.C. § 151 (1976). The last paragraph of § 3151, which is a declaration of policy, states the following:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

¹²² 353 U.S. at 457.

¹²³ 432 U.S. 355, 367 (1977).

processes"¹²⁴ around which labor relationships are built become threatened by the absence of uniformity, and that statutes of limitation become an issue only when those relationships have already deteriorated.¹²⁵ The simplistic nature of this analysis is best evidenced by the *Hoosier* Court's partial reliance on the national interest in the rapid resolution of labor disputes in choosing Indiana's six-year statute for unwritten contracts over the twenty-year period for agreements reduced to writing.¹²⁶ A labor dispute that continues to develop over a period of years before any action is initiated could have a severe impact upon industrial relationships. Admittedly the "consensual processes" have broken down by the time statutes of limitation come into question, but the national interests would appear to be better served by adhering to a policy effectuating a smooth and swift restoration of the relationships rather than contributing to their irreparability.

The majority in *DelCostello* quoted with approval¹²⁷ Justice Stewart's concurring opinion in *Mitchell*¹²⁸ wherein he observed that Congress drafted the section 10(b) limitation of six months with the belief that it was the "proper balance between the national interests in stable bargaining relationships and finality of private settlements. . . ."¹²⁹ Section 10(b) was not adopted without controversy. Some legislators preferred not to place time limitations on the filing of charges,¹³⁰ arguing that to do so would encourage the practice of concealing acts designed to deprive workers of their rights.¹³¹ The six-month designa-

¹²⁴ 383 U.S. at 702. The Court was referring to the formation of collective bargaining agreements and the rights thereunder. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 707. The Court noted the following:

The six months' provision governing unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. § 160(b), suggests that relatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal.

383 U.S. at 707.

¹²⁷ 103 S. Ct. at 2294.

¹²⁸ 451 U.S. 56, 65 (1981)(Stewart, J., concurring).

¹²⁹ *Id.* at 70-71.

¹³⁰ See SEN. MIN. REP. NO. 105 PART 2, 80TH CONG., 1ST SESS. 37 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) at 463, 499 (arguing that Act should remain free of limitations period on unfair labor practice charges and that Board should determine if there had been undue delay).

¹³¹ See, e.g., 93 Cong. Rec. 3427 (1947)(statement of Senator Wagner). Senator Wagner, author of the 1935 Act, was opposed to adding a limitations period to the filing of

tion appears to have been a compromise with other legislators who supported an even shorter period.¹³² Nevertheless, Congress had felt it necessary to resolve labor disputes quickly and finally for the benefit of all involved and had enacted the section 10(b) six-month limitation period.

Ironically, the greater the need for a quick and smooth restoration of deteriorated labor relationships, the more difficult the general rule makes this achievement. Justice White, dissenting in *Hoosier*, took note of this problem. Even though a large bargaining unit is likely to have a wide range of geographical disbursement among its members, Justice White, joined by Justices Brennan and Douglas, stated that the right of each employee to assert federal claims should be equally available. Justice White pointed out that no good would be realized by giving one employee longer to file than another, or by strapping an employer with claims by some employees which were already barred to other employers.¹³³

CONCLUSION

The obvious need for uniformity of limitations periods in applying federal labor statutes to achieve national goals, coupled with the readily available limitations period of section 10(b), which was fashioned with national policies in mind, should provide the judiciary with the impetus to move away from utilization of scattered state limitations periods in private labor cases. Although arguments for uniformity have long found favor with many federal jurists,¹³⁴ including Supreme Court

unfair labor practice charges. He argued that "[b]y placing a limitation of six months on the bringing of unfair labor practice charges, the bill rewards the unscrupulous employer who by duplicity and concealment can cover his actions which have deprived his employees of their legal rights. Why place such a premium on illegality?" *Id.*

¹³² See S. REP. No. 105, 80th Cong., 1st Sess. 26 (1947), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) at 407, 432 (rider to separate bill had proposed three-month limitations period).

¹³³ 383 U.S. 696, 712 (1966) (White, J., dissenting). Justice White made the following statement:

Clearly there is no sense or justice in referring to 50 or more different statutes of limitations so that one employee may be barred after one year while another employee may sue any time within six years. Nor is there any reason why an employer operating under the contract in one State should be bothered with stale claims already barred as against other employers in other states.

Id. at 712.

¹³⁴ See, e.g., *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065*, 430 F.2d 1116, 1124 (9th Cir. 1970) (Duniway, J., concurring) (federal courts should adopt uniform statute of limitations in labor causes of action); *Consolidated Express, Inc. v. New York Shipping*

justices,¹³⁶ the few cases decided since *DelCostello* indicate that the issue remains unresolved.

In *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.*,¹³⁶ the Third Circuit made this statement: "The only clear signal that can be read from footnote 12 in *DelCostello* is that the applicability of *Hoosier* to pure section 301 suits is now an open question."¹³⁷ The Court went on to apply section 10(b) to an action to compel arbitration "essentially for the same reasons relied on in *DelCostello*."¹³⁸

In *Electrical Workers v. Ingram Manufacturing Co.*,¹³⁹ a suit by a union to enforce an arbitration award, the Fifth Circuit rejected the company's argument that section 10(b) should govern the timeliness issue, finding no similarities between the hybrid suit involved in *DelCostello* and "straightforward" suits under section 301.¹⁴⁰

In *Carpenters Local 1020 v. FMC Corp.*,¹⁴¹ the union brought an action pursuant to section 301 to set aside an arbitration award.¹⁴² The suit was filed five and one-half months after the arbiter's decision was rendered.¹⁴³ The union argued that footnote twelve of the *DelCostello* opinion mandated application of the six-month limitations period from section 10(b).¹⁴⁴ In that footnote the *DelCostello* Court had made this statement: "[E]ven if this action were considered as arising solely under § 301, the objections to use of state law and the availability of a

Ass'n, Inc., 452 F. Supp. 1024, 1035 n.12 (D. N.J. 1978)(Justice Stern noted in § 303 suit that applying the "borrowing" rule is "like fitting a round peg in a square hole. The most sensible thing to do, if the case law would permit it, would be for the federal courts to develop federal statutes of limitations, as a matter of federal common law, to fill the void."); *Fischbach & Moore, Inc. v. International Union of Operating Eng'rs*, 198 F. Supp. 911, 915 (S.D. Cal. 1961)(court applied laches test to § 303 action), *rev'd*, 350 F.2d 1119 (9th Cir.)(court applied California statute of limitations), *cert. denied*, 384 U.S. 904 (1965).

¹³⁶ See *supra* note 133 and accompanying text (dissenting opinion in *Hoosier*).

¹³⁷ 736 F.2d 896 (3d Cir. 1984).

¹³⁸ *Id.* at 901. The *Westinghouse* opinion reviewed the findings of *Carpenters Local 1020*, *Derwin* and *Ingram Mfg.*, noting that these cases were actions to vacate arbitration awards and actions to enforce an arbiter's decision. The court stated that these cases were "arguably consistent with *DelCostello*," but suggested that they did not resolve the issue with certainty. 736 F.2d at 901.

¹³⁹ *Id.*

¹⁴⁰ 715 F.2d 886 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1711 (1984).

¹⁴¹ *Id.* at 888-89.

¹⁴² 724 F.2d 815 (9th Cir. 1984).

¹⁴³ *Id.* at 816.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 817 & n.1.

well-suited limitations period in § 10(b) would call for application of the latter rule.”¹⁴⁵ The court rejected the union’s argument, ruling that Oregon’s twenty-day statute of limitations for commercial arbitration applied.¹⁴⁶ It read the *DelCostello* footnote as applying section 10(b) only to those actions under section 301 that “closely resemble” unfair labor practices.¹⁴⁷

It must be noted that Congress itself could provide a uniform statute of limitations so that its stated policies could be better realized. Congress provided — after forty years — a uniform limitations period in the Clayton Act,¹⁴⁸ so it may be presumed that similar Congressional action in the labor field is possible. But whether the federal court system or Congress takes the initiative on this matter, national interests in industrial relationships and interstate commerce would best be served by the adoption of a uniform limitation period for private federal labor causes of action.

Richard B. Hankins

¹⁴⁵ 103 S. Ct. at 2287 n.12.

¹⁴⁶ 724 F.2d at 816.

¹⁴⁷ *Id.* at 817-18 n.1; see also *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 487 (1st Cir. 1983) (ruled that *DelCostello* did not apply to pure § 301 action to vacate arbitration award).

The difference between an action to vacate an arbitration award and a suit to compel arbitration is not sufficient to warrant different results. In both instances the underlying dispute will so frequently resemble an unfair labor practice that the same limitations period should apply. See *supra* notes 111-20 and accompanying text.

¹⁴⁸ See *supra* notes 35-42 and accompanying text.

THE RESULTS TEST OF AMENDED SECTION 2 OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE SENATE REPORT FACTORS

I. INTRODUCTION

On June 29, 1982, President Reagan signed into law certain amendments to the Voting Rights Act of 1965, extending the life of that Act with important changes.¹ Among the 1982 amendments, the changes incorporated into section 2 are perhaps the most significant. Amended section 2 replaces the "intent" standard formerly applied by courts in voting discrimination and dilution suits² with a "results" standard. This new test permits demonstration of a section 2 violation through proof that an electoral scheme impedes a minority group's ability to participate in the electoral process, without delving into the question of discriminatory intent.³ Amended section 2 defines dilutionary schemes as such an impediment.⁴ An electoral scheme is dilutionary if the political processes leading to nomination or election are not equally open to a minority group in the sense that members of that group have less opportunity to participate and to elect representatives of their choice.⁵ Most commonly, dilution arises from the interplay between procedural devices, such as at-large or multimember voting schemes,⁶ and the behavioral characteristics of the voting population,

¹ See Voting Rights Act Amendments of 1982, 42 U.S.C. §§ 1971-1973aa-6 (1982). The Voting Rights Act Amendments of 1982 provide a broader "bail-out" procedure set forth in § 4(a) under which certain jurisdictions could remove themselves from § 5 coverage, see 42 U.S.C. § 1973b (1982); clarified the standard for proving violations of § 2, see 42 U.S.C. § 1973 (1982); and added an additional section requiring assistance to certain handicapped voters, see 42 U.S.C. § 1973aa-6. The Act also extended the coverage of §§ 5, 6, 7 and 8. See 42 U.S.C. §§ 1973c-1973g (1982).

² See *infra* notes 41-49 and accompanying text.

³ See *infra* text accompanying notes 52-54.

⁴ See 42 U.S.C. § 1973 (1982); see also *infra* text accompanying notes 52-54.

⁵ See 42 U.S.C. § 1973(b)(1982).

⁶ An at-large or multimember scheme provides representation of a single electoral district by two or more officials and voters may usually vote for as many candidates as there are positions. Single-member districts on the other hand have only one representative. See Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and Legislative Results Standard*, 50 GEO. WASH. L. REV. 689, 694-96 (1982)(detailing criticisms of at-large and multimember districts); see also *infra* notes 68, 69 and accompanying text.

such as systematic bloc voting among members of the majority group.⁷ Dilution is not found where the electoral ineffectiveness of a minority group results from its own behavior.⁸ The Senate Report accompanying the 1982 amendments points to certain objective factors to assist courts in their evaluation of dilution claims.⁹

This comment will first present a brief history of the development of the concept of dilution and the standards traditionally employed by courts in evaluating dilution claims.¹⁰ The objective factors noted in the Senate Report will then be analyzed, focusing particularly on the type of evidence used to support the finding of a given objective factor.¹¹ It is hoped that the treatment given the Senate Report factors will assist individuals involved in a dilution challenge in the evaluation of their respective cases.

II. HISTORY

The fifteenth amendment to the United States Constitution provides citizens with the right to vote.¹² Viewed historically as guaranteeing the citizen the right to cast a ballot and have it counted,¹³ the protections afforded under the rubric of the "right to vote" have been extended during the past several decades to embrace also the right to cast an effective ballot. "Effectiveness" was not, however, a notion strictly within the prescriptions of the fifteenth amendment but rather evolved in a series of cases applying equal protection analysis to claims alleging that a given voting scheme diluted the voting strength of a particular group relative to other groups.¹⁴

In the landmark decision *Reynolds v. Sims*,¹⁵ the United States Supreme Court considered a challenge to an apportionment scheme which alleged that the scheme was dilutionary. In *Reynolds*, the plain-

⁷ See Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 4 (C. Davidson ed. 1984)(discussion of interplay between voting procedures and behavior in dilution theory).

⁸ *Id.*; see also *infra* text accompanying notes 26, 27.

⁹ See S. REP. NO. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 206-07; see also note 60 and accompanying text. See generally Hartman, *supra* note 6, at 690-92 (discussion of dilution theory).

¹⁰ See *infra* notes 15-51 and accompanying text.

¹¹ See *infra* notes 70-187 and accompanying text.

¹² U.S. CONST. amend. XV, § 1. "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." *Id.*

¹³ *United States v. Classic*, 313 U.S. 299, 315 (1941).

¹⁴ See *infra* notes 15-38 and accompanying text.

¹⁵ 377 U.S. 533 (1964).

tiffs asserted that the failure of the State of Alabama to reapportion legislative districts in light of substantially unequal rates of population growth among the districts constituted a denial of equal protection of the laws.¹⁶ The Court determined that dilution of the relative weight of a given ballot may constitute an abridgement of the right to vote as effective as its absolute prohibition.¹⁷ The Court found that the comparative disparity in the size of voting populations among the districts worked a dilutionary effect on the votes of those individuals living in the larger district.¹⁸ The decision thus established the one-man, one-vote standard, which requires substantial equality of population among election districts,¹⁹ and therefore gave credence to the notion that voting schemes which diminished the voting strength of particular groups violated the equal protection clause of the fourteenth amendment.

Following *Reynolds*, the United States Supreme Court confronted challenges to at-large or multimember districting plans based on claims that the plans operated to dilute minority group voting strength and thus denied the group equal opportunity, even though the plans were constitutional under the *Reynolds* one-man, one-vote standard. This movement of case law involving minority vote dilution was marked not only by a hesitation to accept minority vote dilution as valid constitutional theory but also by a concomitant inability to formulate a clear evidentiary standard.²⁰

In *Fortson v. Dorsey*,²¹ the Court held that multimember districts were not per se unconstitutional under the equal protection clause.²²

¹⁶ *Id.* at 540.

¹⁷ *Id.* at 555.

¹⁸ *Id.* at 563. The Court stated the following:

The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or ten of them must vote before the effect of their voting is equivalent to that of their favored neighbor.

Id.

¹⁹ See *id.* at 577. The Court found that "[t]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.*

²⁰ See Hartman, *supra* note 6, at 692-93. The Supreme Court's decisions in *Fortson v. Dorsey*, 379 U.S. 433 (1965), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), indicated at least an initial reluctance regarding the validity of minority vote dilution theory. The language in *Whitcomb* evinced "unease with a number of the central political and sociological assumptions underlying racial vote dilution theory. . . ." Hartman, *supra* note 6, at 693.

²¹ 379 U.S. 433 (1965).

²² *Id.* at 438.

The Court intimated that a particular voting scheme may "designedly or otherwise" operate to cancel out the voting strength of a racial or political group and may therefore fail to pass "constitutional muster."²³ Later, in *Whitcomb v. Chavis*,²⁴ a case involving a challenge to an at-large voting scheme in Marion County, Indiana, the Court determined that a finding that a minority group was not proportionally represented was insufficient alone to constitute a constitutional violation.²⁵ The plaintiffs were required to show that they were denied equal access to the political process.²⁶ In *Whitcomb*, however, the evidence suggested that the lack of minority representation was the result of normal party politics and that the minority enjoyed equal opportunity for participation.²⁷

It was not until *White v. Regester*²⁸ that the Supreme Court made an effort to clarify the evidentiary standard to be used in minority vote dilution challenges of electoral schemes. Taking up the plaintiffs' contention that the multimember district had the effect of diluting minority voting strength, the *White* Court determined that the plaintiff had the burden of showing that the minority group "had less opportunity than did other residents in the district to participate in the political processes. . . ."²⁹ Adopting the portion of the lower court decision which required certain multimember districts to be redrawn, the Court noted with approval the totality of the circumstances approach of the lower court, which had also made a qualitative distinction between "enhancing factors" and those factors relatively more essential to a finding of unconstitutional dilution.³⁰ The Court upheld the lower court finding that given the historical and continuing constraints on

²³ *Id.* at 439.

²⁴ 403 U.S. 124 (1971).

²⁵ *Id.* at 153. There was no evidence that minorities were not allowed to register, cast a ballot, choose a political party, or to be on the slate of either party. *Id.* at 149-50.

²⁶ *Id.* at 153. This was the first case in which the Court used the language which was ultimately to be codified in amended § 2 of the Voting Rights Act. See *Whitcomb*, 403 U.S. at 149; see also *infra* note 54. This vague language is not without its critics. See, e.g., *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 161 (5th Cir. 1977) (Hill, J., dissenting) (questioning meaning of "access to the political process").

²⁷ *Whitcomb*, 403 U.S. at 154-55.

²⁸ 412 U.S. 755 (1973).

²⁹ *Id.* at 766. This language, adopted from *Whitcomb*, was embodied practically verbatim in amended § 2 of the Voting Rights Act. See *infra* note 54.

³⁰ *White*, 412 U.S. at 766-68. *White* introduced the "totality of the circumstances" concept, which was included by Congress in amended § 2 and has since been used by nearly every court deciding vote dilution claims. See, e.g., *Brantley v. Brown*, 550 F. Supp. 490, 497 (S.D. Ga. 1982) (applying "totality of circumstances" approach); *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 914 (S.D. Ala. 1982) (same).

minority group participation in the electoral process, its voting strength was impermissibly diluted.³¹ *White* was the first case in which the Supreme Court seemed to embrace a "results" approach to vote dilution claims. The Court made no reference to the intent or motives of the persons who adopted or maintained the plan. The Court therefore indicated a readiness to accept proof of either discriminatory intent or discriminatory results in upholding vote dilution challenges.

In what was perhaps the leading circuit court decision, the United States Court of Appeals for the Fifth Circuit, in *Zimmer v. McKeithen*,³² applied a refined and more explicit version of the *Whitcomb-White* analytical framework in overturning a Louisiana at-large voting scheme. Considering the lower court's finding of a lack of minority vote dilution based on an apparent substantial equality among voter district population as prescribed by *Reynolds*, the Fifth Circuit stated that the issue of population equality inherent in apportionment cases was distinct from the issue of equality of opportunity inherent in minority vote dilution cases.³³ Specifically, the court determined that, assuming equality in interdistrict voting population, a particular voting scheme was still capable, by design or operation, of impeding minority group access to the electoral process by submerging their collective voting strength.³⁴

Focusing on whether the particular scheme operated to diminish or submerge minority voting strength the court presented a delineation of the evidentiary factors discussed in *White*, designating each as either a "primary" factor or an "enhancing" factor.³⁵ Included in the list of primary factors were a lack of access to the political system, unresponsiveness to minority needs, the tenuousness of the policy underlying the use of the at-large voting system, and the existence of past

³¹ *White*, 412 U.S. at 766-68. The factors existing in the counties in question were a history of official discrimination, majority vote requirements, no subdistrict residency requirement, few minorities elected in the past, unresponsiveness to the needs of the black community, racial campaign tactics, and a white-dominated slating group. *Id.* These factors were the genesis of the criteria in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). See *infra* notes 35, 36 and accompanying text.

³² 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975).

³³ *Zimmer*, 485 F.2d at 1303.

³⁴ *Id.*

³⁵ *Id.* at 1305. Later cases interpreted *Zimmer* as presenting four "primary" factors and four "enhancing" factors. See *Lodge v. Buxton*, 639 F.2d 1358, 1379-80 (5th Cir. 1981), *aff'd sub nom.* *Rogers v. Lodge*, 458 U.S. 613 (1982)(examined all eight factors); *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979)(examined four primary factors), *vacated and remanded*, 704 F.2d 143 (5th Cir. 1983).

discrimination which precluded effective minority participation in the electoral system. The enhancing factors consisted of an existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. A finding of unconstitutional minority vote dilution was to be established upon a showing of an aggregate of primary and enhancing factors.³⁶

The *Zimmer* framework was applied in nearly every subsequent vote dilution case in the Fifth Circuit³⁷ as well as in other circuits.³⁸ The United States Supreme Court, however, showed signs of disenchantment with the evidentiary standard developed by the *White* and *Zimmer* courts. For example, in *Washington v. Davis*³⁹ and *Arlington Heights v. Metropolitan Housing Development Corp.*,⁴⁰ the Court prescribed an intent standard to be used in assessing racial discrimination claims based on the equal protection clause of the fourteenth amendment, but left unstated whether intent was to be applied also to dilution claims, which also had relied exclusively on the equal protection clause.

In *City of Mobile v. Bolden*,⁴¹ however, the Supreme Court, in a plurality decision, rejected the results approach of *White* and *Zimmer* and substituted an intent standard for minority vote dilution claims. In *Bolden*, the plaintiffs alleged that the at-large scheme diluted minority voting strength in violation of section 2 of the 1965 Voting Rights Act, the fourteenth amendment, and the fifteenth amend-

³⁶ *Zimmer*, 485 F.2d at 1305.

³⁷ See, e.g., *David v. Garrison*, 553 F.2d 923, 928-31 (5th Cir. 1977)(Lufkin, Texas, at-large plan challenged); *McGill v. Gadsden County Comm'n*, 535 F.2d 277, 280-81 (5th Cir. 1976)(Gadsden County, Florida at-large scheme challenged).

³⁸ See, e.g., *Perkins v. City of West Helena*, 675 F.2d 201, 208-13 (8th Cir.)(challenged at-large method of electing city alderman), *aff'd*, 459 U.S. 801 (1982); *Kendrick v. Walder*, 527 F.2d 44, 48-49 (7th Cir. 1975)(challenged at-large elections in Cairo, Illinois).

³⁹ 426 U.S. 229 (1976). In *Washington*, the Court adopted the purposeful discrimination standard for proving race discrimination under the equal protection clause. Disproportionate impact alone was insufficient to show an invidious purpose. *Id.* at 239.

⁴⁰ 429 U.S. 252 (1977). In *Arlington Heights*, the Court noted that an invidious discriminatory purpose may be proven through both direct and circumstantial evidence. *Id.* at 266. The Court found certain circumstantial evidentiary sources to be the most relevant. These sources included historical background, the specific sequence of events leading up to the challenged decision, a deviation from normal procedural practices, a departure from substantive criteria normally applied, and the legislative or administrative history. *Id.* at 267-68.

⁴¹ 446 U.S. 55 (1980).

ment.⁴² In reversing the two lower courts⁴³ the plurality discredited the *Zimmer* factors as sufficient to establish discriminatory intent⁴⁴ as required by the equal protection clause of the fourteenth amendment. The Court also determined that the fifteenth amendment did not reach minority vote dilution claims⁴⁵ and ruled that since section 2 was essentially the functional equivalent of the fifteenth amendment, plaintiffs were without a separate statutory remedy.⁴⁶ After *Bolden*, the intent standard governed discrimination claims brought under the fourteenth and fifteenth amendments and section 2.⁴⁷

Accordingly, under the intent standard, disproportionate impact on minority groups was alone insufficient to establish a violation of the equal protection clause of the fourteenth amendment.⁴⁸ Instead, proof of invidious purpose was to be demonstrated through evidence substantially more direct than the circumstantial evidence offered under the result standard.⁴⁹ An invidious purpose, however, was properly in-

⁴² *Id.* at 65.

⁴³ *Id.* at 80. The district court found the following aggregate of *Zimmer* factors present in *Mobile*: the absence of any minorities elected to the Board of Commissioners, discrimination against minorities in municipal employment and the dispensing of municipal services, a history of official discrimination against minorities in Alabama, and the mechanics of the at-large system, including a majority vote requirement. *Bolden v. City of Mobile*, 423 F. Supp. 384, 386-94 (S.D. Ala. 1976). The United States Court of Appeals for the Fifth Circuit affirmed the judgment. *Bolden v. City of Mobile*, 571 F.2d 238, 247 (5th Cir. 1978).

⁴⁴ *Bolden*, 446 U.S. at 72-74.

⁴⁵ *Id.* at 65. Although this position was not supported by a majority of the Justices, the Court determined that the fifteenth amendment merely prohibits "purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" *Id.*

⁴⁶ *Id.* at 61.

⁴⁷ *Id.* at 60-65. This conformed to the standard set forth in the intervening cases of *Arlington Heights*, 429 U.S. 252 (1977), and *Washington*, 426 U.S. 229 (1976).

⁴⁸ *Bolden*, 446 U.S. at 73.

⁴⁹ *Id.* at 74 nn. 20 & 21. The United States Supreme Court, in *Rogers v. Lodge*, 458 U.S. 613 (1982), reaffirmed its decision in *Bolden* and held that an election scheme violated the fourteenth amendment only if the plan was conceived or maintained, in a purposeful fashion, to further racial discrimination. *Id.* at 617.

In marked contrast to *Bolden*, however, where the various *Zimmer* factors relied upon by the lower courts were singled out and discredited, the Court in *Rogers* enumerated the lower court's findings consisting largely of *Zimmer* factors and endorsed a totality of the circumstances approach to the question of discriminatory intent. *Rogers*, 458 U.S. at 622. *Rogers* can thus be seen as an effort by the Court to restore the significance of circumstantial evidence in determining whether a discriminatory purpose underlies the maintenance of an electoral scheme, in contrast to *Bolden*, which appeared to emphasize that some direct evidence was required for a finding of discriminatory intent. See *Bolden*, 446 U.S. at 74 n.21.

ferred from the totality of the relevant facts.⁵⁰ The *Bolden* decision generated considerable controversy.⁵¹

In response to *Bolden* Congress amended section 2 of the Voting Rights Act of 1965.⁵² The amended version states that no voting procedure is to be used "which results in a denial or abridgement of the right of a citizen to vote on account of race or color"⁵³ and thereby preempts that portion of *Bolden* establishing "intent" as the proper section 2 standard, while also making clear that section 2 does indeed apply to minority vote dilution claims by incorporating language contained in *White* to the effect that a violation is found where, based on the totality of circumstances, the political processes leading to nomination or election are not equally open to members of minority groups. Amended section 2 also insures that the results test is not to be interpreted as requiring proportional representation.⁵⁴

The Senate Report accompanying the Voting Rights Act Amendments of 1982⁵⁵ made clear the reasons behind Congressional dissatisfaction with the *Bolden* intent standard. First, the intent standard focused on the wrong question, that is, it required a divination of the motives behind official action creating a particular voting scheme.⁵⁶ Instead, inquiry was to be directed, under the results standard, toward

⁵⁰ *Washington*, 426 U.S. at 242.

⁵¹ See, e.g., *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 138-49 (1980)(Court's analysis inadequate); Note, *City of Mobile v. Bolden: Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 Hous. L. REV. 611, 614 (1981)(serious implications for future voting practices).

⁵² S. REP. NO. 417, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 195.

⁵³ 42 U.S.C. § 1973(a)(1982).

⁵⁴ Section 2 of the Act now provides in part:

A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b)(1982). For a thorough discussion of the Act's history in Mississippi, see Comment, *Mississippi and the Voting Rights Act: 1965-1982*, 52 Miss. L.J. 803 (1982).

⁵⁵ See S. REP. NO. 417, 97th Cong., 2d Sess. 2, 15, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 179.

⁵⁶ *Id.* at 36, 1982 U.S. CODE CONG. & AD. NEWS at 214.

determining whether a minority group had equal access to the electoral process.⁵⁷ Second, the intent standard was unnecessarily divisive because it inherently involved charges of racism against public officials or entire communities. Third, the intent standard was an "inordinately difficult" burden for plaintiffs to carry.⁵⁸ The problems created by the passage of substantial periods of time and lack of pertinent official records made plaintiffs' duty to produce evidence of discriminatory motive oftentimes impossible to achieve.⁵⁹

The Senate Report is also significant because it further elaborates on the evidentiary factors to be examined by the courts in assessing section 2 dilution claims. According to the Senate Report guidelines, a plaintiff may establish a section 2 violation by demonstrating the existence of an aggregate of "objective factors," which include (1) the extent of historical official discrimination; (2) the extent of racially polarized voting; (3) certain voting practices or procedures that enhance the opportunity for discrimination; (4) the denial of access to the process of slating candidates; (5) the effects of discrimination in education, employment, and health; (6) campaigns characterized by racial appeals; and (7) the number of minority elected officials.⁶⁰ Somewhat significantly, the Senate Report reduced the evidentiary value of two *Zimmer* primary factors—tenuousness and unresponsiveness—by failing to list them in conjunction with the foregoing factors. The Senate Report does, however, make mention of them,⁶¹ recognizing perhaps that these factors are really more relevant to purpose rather than results. The enumerated factors have been deemed to be the most relevant for most purposes and other factors may be resorted to when necessary to properly evaluate a dilution claim.⁶²

III. THE SENATE REPORT FACTORS

A. Introduction

It is the purpose of amended section 2 to protect the right of minority groups to be free from certain election practices and procedures that deny them equal opportunity to participate in the political processes.⁶³ The results test of section 2 is designed to ensure the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 28-29, 1982 U.S. CODE CONG. & AD. NEWS at 206-07.

⁶¹ *Id.* at 29, 1982 U.S. CODE CONG. & AD. NEWS at 207.

⁶² *Id.*

⁶³ *Id.* at 28, 1982 U.S. CODE CONG. & AD. NEWS at 206.

broadest possible protection to minority groups.⁶⁴ In keeping with this basic tenet, section 2 requires the courts to follow a totality of the circumstances approach to section 2 claims.⁶⁵ Thus, a court may find one Senate Report factor more or less important depending on the nature of the challenged electoral scheme. Also, a court is not required to find that a majority of the objective factors exists before finding a section 2 violation.⁶⁶ Consistent with this flexible treatment accorded the Senate Report factors, some courts have noted the interdependence of a number of the factors in that a finding of one factor will support the finding of other factors.⁶⁷

Besides the objective factors cited by the Senate Report that focus on those behavioral characteristics of voting populations which operate from within an electoral scheme to impede minority group access, it is perhaps as essential to consider the structural elements of the electoral scheme. It has been noted, for example, that at-large or multimember schemes have proved to be most vulnerable to section 2 attacks because its operation is likely to have the effect of emphasizing the dis-

⁶⁴ *Id.* at 27, 1982 U.S. CODE CONG. & AD. NEWS at 204. "The Committee believes that the amendment is . . . necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth amendments rights. . . ." *Id.*

⁶⁵ See 42 U.S.C. § 1971 (1982).

⁶⁶ S. REP. NO. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 207.

The amount of evidence a trial court must include in its opinion was most recently addressed by the Fifth Circuit in *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984). Concluding that there was proof of neither an invidious purpose nor a discriminatory effect, the district court had denied the plaintiffs' petition which alleged that the at-large method for selecting city councilmen violated the fourteenth and fifteenth amendments and amended section 2. *Id.* at 1019-20.

On appeal, the United States Court of Appeals for the Fifth Circuit tangentially discussed the substantive issues of the vote dilution claim and focused almost entirely on the amount of evidence the trial court included in its opinion. Although noting that the lower court's opinion was long and detailed, the circuit court found that the opinion failed to discuss all the substantial contrary evidence. *Id.* at 1021. The court of appeals stated that FED. R. CIV. P. 52(a), which requires the district court to make findings of fact and conclusions of law in deciding all cases tried without a jury, has not been complied with "if the district court reaches a conclusion on one of the *Zimmer* inquiries without discussing substantial relevant contrary evidence." *Velasquez*, 725 F.2d at 1020 (quoting *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979), *vacated on other grounds*, 704 F.2d 143 (5th Cir. 1983)). The failure of the trial court in *Velasquez* to discuss the contrary evidence prevented the court of appeals from determining whether the evidence was considered unpersuasive or was not considered at all. *Velasquez*, 725 F.2d at 1021. Consequently, the case was remanded with instructions to include additional findings of fact in the opinion. *Id.* at 1023.

⁶⁷ See *infra* notes 100, 104, 179-80 and accompanying text.

criminatory impact of certain objective factors. For example, assuming the existence of racial bloc voting, at-large and multimember districts would maximize the political impotence of geographically concentrated minority groups since at-large and multimember districts are geographically larger than alternative single-member districts.⁶⁸ At-large and multimember districts may also influence the way in which candidates organize their campaigns which may, in turn, emphasize the inhibitory influence of a reduced socioeconomic status felt by minority group members.⁶⁹ A discussion of the objective factors listed in the Senate Report follows. The type of evidence considered by courts in evaluating whether an objective factor exists in the challenged electoral scheme is discussed also.

B. Historical Discrimination

Since the earliest cases, historical discrimination has consistently been a critical factor in the determination of vote dilution.⁷⁰ In *Zimmer*, the court found it to be a primary factor in a finding of dilution.⁷¹ Historical discrimination is listed first in both the Senate and House Reports,⁷² and the courts in every successful vote dilution claim involving amended section 2 have emphasized this factor.⁷³

Past discrimination has been found to impair the present-day ability of minorities to gain equal access to the political process.⁷⁴ For example, in *Zimmer*, the court found that, although the historical imped-

⁶⁸ See Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 355 (1976). Minorities residing in geographically compact areas are in an inherently stronger electoral position in a properly drawn single-member districting plan than in an at-large system in which they would remain in a distinctively weaker position. *Id.* Thus, because under the at-large system the majority elects all of the representatives, the minority candidates are constantly defeated. *Id.*

⁶⁹ See Jewell, *The Consequences of Single and Multimember Districting*, in REPRESENTATION AND REDISTRICTING ISSUES 131-32 (1982)(finding increased cost and greater organizational sophistication required of campaign organizations operating within at-large districts).

⁷⁰ See, e.g., *White v. Regester*, 412 U.S. 755, 766, 768 (1973)(recognizing that historical discrimination may impede minorities' ability to have full access to political process).

⁷¹ See *supra* note 36 and accompanying text.

⁷² See *supra* text accompanying note 60; H.R. REP. NO. 227 at 30.

⁷³ E.g., *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 341-42 (N.D. Tex. 1983)(noting history of discrimination); *Boykins v. City of Hattiesburg*, No. H77-0062(c), slip op. at 16, 17 (S.D. Miss. Feb. 29, 1984)(magistrate opinion)(same).

⁷⁴ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d at 1546, 1567 (11th Cir. 1984)(past discrimination prevents minorities from participating equally in political process).

iments had been eliminated several years prior to the commencement of the suit, their influence on the minority population persisted in the form of reduced minority voter registration, and therefore historical discrimination remained a relevant consideration.⁷⁶ A history of past discrimination has also been found to produce certain lingering effects in the form of disproportionate educational, employment, income level and living conditions which have also tended to depress minority political participation.⁷⁶

Proof of past discrimination has been made in three ways. One way is to have an expert witness testify on behalf of the plaintiffs. In *Boykins v. City of Hattiesburg*,⁷⁷ for example, an expert relied upon voting patterns as well as a history of racial prejudice in testifying that many white voters in Hattiesburg remained determined to deny minority participation in the political system.⁷⁸

In addition to expert testimony, courts have allowed nonexperts to testify about personal experiences with past discrimination. In *Taylor v. Haywood County*,⁷⁹ a citizen testified that a quarter of a century earlier he had been denied the right to register to vote and had been fired from his job after he attempted to register.⁸⁰ In *Boykins*, lay witnesses from the white community testified that members of the white community continued to oppose and fear the election of minorities to office.⁸¹

A third way of establishing past discrimination is for the court to take judicial notice of the historical discrimination against minorities.⁸²

One apparent flaw in using historical discrimination as a guideline in a vote dilution claim is that improved race relations and significant increases in minority voter registration are accorded little significance.

⁷⁶ *Zimmer*, 485 F.2d at 1306.

⁷⁶ S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.114, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 207; see also *infra* notes 142-151 and accompanying text.

⁷⁷ No. H77-0062(c)(S.D. Miss. Feb. 29, 1984)(magistrate opinion).

⁷⁸ *Id.* at 14; see also *Taylor v. Haywood County*, 544 F. Supp. at 1122, 1125, 1126-27 (W.D. Tenn. 1982)(expert testifying as to past discrimination).

⁷⁹ 544 F. Supp. 1122 (W.D. Tenn. 1982).

⁸⁰ *Id.* at 1124; see also *Boykins* No. H77-0062(c), slip op. at 13-14 (black elected officials testified to racial prejudice which had historically confronted them, and to reason whites wanted to maintain at-large systems).

⁸¹ *Boykins*, No. H77-0062(c), slip op. at 15.

⁸² See *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 341 (N.D. Tex. 1983)(court taking judicial notice of past discrimination); *Moore v. Leflore County*, No. GC 83-249-WK-O, slip op. at 5 (N.D. Miss. June 5, 1985)(noting voting activity prior to passage of 1965 Voting Rights Act); cf. *Buskey v. Oliver*, 565 F. Supp. 1473, 1475 (M.D. Ala. 1983)(listing past discrimination).

Logic insists that if minorities are registering and voting in record numbers, they must have overcome the influence of past discrimination. Courts, however, have reached a different conclusion by reasoning that minorities still retain a "sense of futility" caused by past discrimination which discourages them from becoming politically active.⁸³ Courts have found the continuing influences of past discrimination in current political contests despite the admitted eradication of direct barriers to minority voter registration,⁸⁴ substantial recent increases in minority voter registration,⁸⁵ and the amelioration of racial antagonism.⁸⁶ Thus, past discrimination continues to play an important role when courts examine whether minorities are able to fully participate in the political process.⁸⁷

C. Racially Polarized Voting

Although the Fifth Circuit has previously regarded the existence

⁸³ See *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983)(past discrimination discourages blacks from becoming involved in governmental process); cf. *Moore v. Le-flore County*, No. GC 83-249-WK-O, slip op. at 5-8 (N.D. Miss. June 5, 1985)(other disadvantages suffered by blacks outweigh lack of lingering effects); *Boykins* No. H77-0062(c), slip op. at 16 (at-large system is "part and parcel" of historical discrimination and its present results).

⁸⁴ See *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983)(residual effects of past discrimination established despite removal of impediments to black registration).

⁸⁵ See *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 342 (N.D. Tex. 1983)(recent increase in black voter registration not sufficient to overcome lingering effects of past discrimination).

For the past year, various minority groups have conducted nationwide voter registration drives with notable success. See Issacson, *Seeking Votes and Clout*, TIME, Aug. 22, 1983, at 20, 21. As a result of these registration drives, the gap between black and white turnout fell to an historic low of 7%. Moreover, in nine states, blacks voted in greater proportion than white voters. Consequently, the number of black state legislators increased by the largest number ever. *Id.*

These registration drives have focused on the southern states. The result has been an estimated 40,000 new registered voters in Mississippi alone, increasing black registration by about 11% and increasing the black vote in recent elections by 13%. *Id.* at 22; see also *Clarion Ledger*, July 6, 1984, at B3, col. 3 (registration drive focuses on Mississippi Delta). But see *Jones v. City of Lubbock*, 727 F.2d 364, 385 (5th Cir. 1984)(present system preserves past lack of access despite success of recent registration drives); *Lodge v. Buxton*, 639 F.2d 1358, 1377-78 (5th Cir. 1981)(lingering effects of past discrimination found despite substantial recent increase in minority voter registration), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982).

⁸⁶ See *Taylor*, 544 F. Supp. at 1124, 1125, 1130 (plaintiffs' witnesses and court admitting race relations had greatly improved).

⁸⁷ *Major v. Treen*, 574 F. Supp. 325, 339-40 (E.D. La. 1983).

of racially polarized voting essential to a dilution challenge,⁸⁸ the legislative history of section 2 indicates that this factor is one of several which may satisfy the plaintiff's burden of proof.⁸⁹ One court has defined racially polarized voting as follows:

Racially polarized voting occurs when race is a predominant factor and influence in voter choice. Typically the degree of racial polarity in voting is determined by examining election races in which blacks opposed whites, taking the percentage of voters who supported a candidate of their own race, and subtracting the percentage of voters who voted for a candidate of another race, to obtain a "racial polarization score." For instance, if 80% of the blacks and 5% of the whites supported a black candidate, the racial polarization score would be 80 minus 5, or 75. A score of 60 or 70 is considered to show racially polarized voting.⁹⁰

Consistent voting along racial lines substantially diminishes the opportunity for minorities to elect the candidate of their choice, and it allows elected officials to ignore minority interests without fear of political consequences.⁹¹ Racial bloc voting causes minority candidates to lose elections solely because of their race.⁹²

One court reasoned that racially polarized voting has increased because white voters fear black political participation and have, consequently, voted in larger numbers for white candidates, resulting in a lower margin of victory for black candidates.⁹³

The Senate Report states that plaintiffs alleging racially polarized voting have the burden of proof.⁹⁴ Establishing such proof has taken a

⁸⁸ See *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978)(unconstitutional dilution not found in absence of polarized voting).

⁸⁹ See S. REP. NO. 417, 97th Cong., 2d Sess. 33 (this factor along with other factors may deny minorities meaningful access).

⁹⁰ *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 348 (N.D. Tex. 1983).

⁹¹ *Campbell v. Gadsden County School Bd.*, 691 F.2d 978, 982 (11th Cir. 1982)(citing *Rogers v. Lodge*, 458 U.S. 613, 627 (1982)).

⁹² *Campbell v. Gadsden County School Bd.*, 691 F.2d 978, 982 (11th Cir. 1982); *City of Hattiesburg*, No. H77-0062(c), slip op. at 16; see also *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984)(racial bloc voting shows race-conscious politics).

⁹³ See *Major v. Treen*, 574 F. Supp. 325, 338 (E.D. La. 1983)(explaining reason for increased racially polarized voting).

⁹⁴ See S. REP. NO. 417, 97th Cong., 2d Sess. 34, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 212.

variety of forms. Most often, plaintiffs introduce the testimony of expert witnesses corroborated by statistical data. In *Major v. Treen*,⁹⁵ for example, an expert witness based his opinion on the results of a computerized, stepwise regression program.⁹⁶ The analysis in *Major* revealed a high degree of racially polarized voting.⁹⁷ Based upon the results of other studies and the statistical data, expert witnesses buttressed the testimony as to the degree of racial bloc voting.⁹⁸

Aside from the use of statistical correlations, courts have relied upon less direct evidence to determine if racially polarized voting exists. For example, plaintiffs have introduced evidence of past civil rights litigation in the political subdivision,⁹⁹ past discrimination in general, large election districts, a majority vote requirement, anti-single shot voting provisions, the lack of a provision for at-large candidates to run from particular geographic subdistricts, and the consistent lack of success of qualified minority candidates as proof of racial polarization.¹⁰⁰ Courts have also relied upon the testimony of minority can-

⁹⁵ 574 F. Supp. 325 (E.D. La. 1983).

⁹⁶ *Id.* at 337. A regression equation predicted the number of votes cast for a black candidate by black voters in a certain polling place. A Pearson correlation coefficient was then used to examine all conceivable relationships between a single dependent variable — votes for a black candidate — and several independent variables, such as the number of black registered voters and the total population in each precinct. From this analysis, the program could isolate the one variable which most accurately explained why those votes were received. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 338. In *Campbell v. Gadsden County School Bd.*, 691 F.2d 978 (11th Cir. 1982), the court used another statistical tool. In that case, the plaintiffs' expert used corroborational analysis which yielded a coefficient. The coefficient was a percentage measure of the variation between the percentage of whites registered in each precinct with a percentage of the precinct vote for the white candidates. *Id.* at 983 & n.6; see also *Jones v. City of Lubbock*, 727 F.2d 364, 380 (5th Cir. 1984) (expert relied on polarization studies); *Boykins*, No. H77-0062(c), slip op. at 17 (high degree of polarized voting shown by three different forms of statistical analysis).

⁹⁹ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 n.35 (11th Cir. 1984) (court noting earlier courts' assessment of racial attitudes in Marengo County as evidence of polarization); *Buskey v. Oliver*, 565 F. Supp. 1473, 1475 (M.D. Ala. 1983) (court documenting areas of past discrimination which required litigation to eradicate).

¹⁰⁰ See *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984) (listing of various ways racial bloc voting may be demonstrated) (citing *Nevett v. Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978)); see also *Major*, 574 F. Supp. at 357 (majority vote requirement indirect evidence of polarized voting); *Political Civil Voters Org. v. City of Terrell*, 569 F. Supp. 338, 348 (N.D. Tex. 1983) (percentage and degree of minority victories and existence of de facto residential segregation indirect evidence of polarized voting).

didates and voters.¹⁰¹

To rebut plaintiffs' evidence of polarized voting, defendants have offered evidence showing that minority candidates have succeeded in gaining general voter support. One method is to introduce a statistical analysis of crossover voting in recent elections.¹⁰² Courts, however, have found this method unpersuasive.¹⁰³

Courts have also rejected evidence that minority candidates have been successful in recent at-large elections. In *Major*, for example, a black was elected mayor in an at-large electoral scheme. Nevertheless, the court compared the percentage of black population with the percentage of black elected officials and concluded that the disparity was evidence of racially polarized voting.¹⁰⁴ The at-large election of a minority candidate, in the face of substantial disparity, was found insufficient to overcome evidence of racial bloc voting.¹⁰⁵

D. Voting Practices and Procedures Which Enhance the Opportunity for Discrimination

Courts have identified a number of voting structures and procedures which result in discrimination against minority citizens. One of the most significant is the majority vote requirement which requires a runoff election between the two candidates with the most votes if no candidate receives a majority in the first election. The runoff allows white voters who scattered their votes among various white candidates in the first election to consolidate their votes in the second to defeat a minority candidate who received a plurality of the vote in the first election.¹⁰⁶ The majority vote requirement, combined with racially polarized voting,¹⁰⁷ effectively undermines the ability of minority groups

¹⁰¹ *E.g.*, *Boykins*, No. H77-0062(c), slip op. at 17 (plaintiffs buttressed statistical evidence with testimony of lay witnesses); *cf. Major*, 574 F. Supp. at 338, 357 (court relied upon anecdotal evidence and a study of the literature of past elections).

¹⁰² *See, e.g., Major*, 574 F. Supp. at 339 (defendants offered crossover analysis to rebut plaintiffs' evidence of bloc voting).

¹⁰³ *See Jones v. City of Lubbock*, 727 F.2d 364, 380-81 (5th Cir. 1984)(success of blacks in school board election not indicative of racial attitudes); *Major*, 574 F. Supp. at 339 (defendants' statistical proof faulty because based upon arbitrary rather than random method of selecting test precincts).

¹⁰⁴ *See Major*, 574 F. Supp. at 339 (15% of elected officials were black though city had black population of 55%).

¹⁰⁵ *Id.* at 341.

¹⁰⁶ Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694, 697 (1978).

¹⁰⁷ *See supra* notes 88-105 and accompanying text.

to elect candidates of their choice.¹⁰⁸ A majority vote requirement has the same evidentiary value whether it exists in party primaries¹⁰⁹ or in general elections.¹¹⁰

Another election practice which, when combined with racial bloc voting, enhances the opportunity for discrimination is the anti-single shot provision.¹¹¹ This provision forces minority voters to cast votes for their candidate's opponents, rather than allowing them to concentrate their votes on a single candidate in a multi-candidate field.¹¹² In other words, when voters can cast more than one vote in the same race, an anti-single shot provision forces minority voters to vote for majority candidates.¹¹³ A numbered place system, which requires that candidates run for specific seats, can sometimes act as an anti-single shot provision¹¹⁴ because, like the anti-single shot rule, it prevents a cohesive political group from concentrating on a single candidate.¹¹⁵

The practice of concentrating a high percentage of minority voters in a single district can also result in discrimination against minority voters. Plaintiffs often argue that district lines were drawn to concentrate members of a minority group into one district, thereby minimiz-

¹⁰⁸ See *Major*, 574 F. Supp. at 339 (expert testified to effect of majority vote requirement); accord *Boykins*, No. H77-0062(c), slip op. at 18-19 (majority vote requirement and racial bloc voting combine to cause defeat of minority candidate).

¹⁰⁹ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1570 (11th Cir. 1984)(county required majority vote in Democratic Party primary, though not in general election).

¹¹⁰ See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364, 368 (5th Cir. 1984)(city had majority vote requirement in general election); see also *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 339-40, 347 (N.D. Tex. 1983)(city had majority vote requirement).

¹¹¹ Mississippi's anti-single shot requirement provides in part:

In all cases where two or more persons are to be elected for the same office the failure on the part of any elector to vote for as many candidates as there are persons to be elected to such office shall render his ballot void as to any candidate voted for by him for such office.

MISS. CODE ANN. § 21-11-15 (1972).

¹¹² *Boykins*, No. H77-0062(c), slip op. at 19; see also *United States v. Bd. of Supervisors*, 571 F.2d 951, 954 n.5 (5th Cir. 1978)(noting that this factor enhances a racially discriminatory election system).

¹¹³ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1570 n.45 (11th Cir. 1984)(citing *Nevett v. Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978)).

¹¹⁴ See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984)(existence of numbered places with head-to-head races eliminated advantage for blacks); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 347 (N.D. Tex. 1983)(same).

¹¹⁵ *Boykins*, No. H77-0062(c), slip op. at 19; see also *Rogers v. Lodge*, 458 U.S. 613, 627 (1982)(requirement that candidates run for specific seats enhances lack of minority access).

ing minority voting strength, which is called "stacking."¹¹⁶ Maintaining a high percentage of minorities in a district permits a "wasting" of minority votes—votes that otherwise would be available to help form other majority districts.¹¹⁷

The alternative is creating two or more "high impact" minority districts which would result in less responsiveness to minority concerns.¹¹⁸ Although not assuring the election of a minority candidate, it permits minorities to exert a substantial influence in two or more districts.¹¹⁹

The court in *Rybicki v. State Board of Elections*¹²⁰ addressed the issue of whether "stacking" districts violated the results test of section 2 by diluting minority voting strength. The court concluded that highly concentrated districts, without more, are not violative of the Voting Rights Act, although it recognized that under other circumstances they could be.¹²¹ Under the facts peculiar to *Rybicki*, the court found that the drawing of district lines between heavily concentrated black and substantially white areas had the *long-term results* of diluting black voting strength.¹²²

The courts have generally agreed that a district which is comprised of at least a sixty-five percent black population is a "safe" minority district which will allow full minority political participation.¹²³ The sixty-five percent guideline, which the United States Supreme Court has recognized as "reasonable,"¹²⁴ takes into account the younger median age and lower voter registration and turnout of minor-

¹¹⁶ *E.g.*, *Brantley v. Brown*, 550 F. Supp. 490, 492 (S.D. Ga. 1982)(plaintiffs argued that plan insured that only one black would be elected).

¹¹⁷ *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1152 (N.D. Ill. 1983); *see also* *Karcker v. Daggett*, 103 S. Ct. 2653, 2672 n.13 (1984)(Stevens, J., concurring)(recognizing "stacking" as potential dilution problem).

¹¹⁸ *See* *Jordan v. Winter*, 541 F. Supp. 1135, 1143-44 (N.D. Miss. 1982)(three-judge panel)(state legislature choosing two "high impact" districts rather than one "safe" district).

¹¹⁹ *See* *United States v. Bd. of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978)(two districts with substantial black population more effective than one district with sizeable black majority).

¹²⁰ 574 F. Supp. 1147 (N.D. Ill. 1983).

¹²¹ *Id.* at 1152.

¹²² *Id.* at 1158 (emphasis in original).

¹²³ *See, e.g.*, *Buskey v. Oliver*, 565 F. Supp. 1473, 1479 (M.D. Ala. 1983)(recognizing that 65% black district is "safe"); *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982)(same). *See generally* Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1620-51 (1983)(thorough discussion of results of creating "safe" districts).

¹²⁴ *United Jewish Org. v. Carey*, 430 U.S. 144, 164 (1977).

ity citizens.¹²⁵ This sixty-five percent figure, however, has not always been found satisfactory by the courts.¹²⁶

Of course, the creation of "safe" districts suggests that only a candidate of the same race can properly represent a voter.¹²⁷ A legislative body may be totally responsive to the interests of minorities and still reasonably conclude that the creation of "safe" districts is not in the best interest of the community.¹²⁸

Other election practices and procedures which have been found to discriminate against minority candidates and voters are residency requirements,¹²⁹ staggered terms,¹³⁰ property requirements,¹³¹ unusually

¹²⁵ *Rybicki*, 574 F. Supp. at 1149 n.4; see also *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982)(65% figure result of larger percentage of white voters than black voters).

¹²⁶ See, e.g., *Buskey v. Oliver*, 565 F. Supp. 1473, 1480, 1484 n.24 (M.D. Ala. 1983)(court reduced effective percentage to 60% because of unstable nature of predominately black university students).

The failure of a black to be elected in a 65% district is evidence that the idea of a percentage is unworkable in the first place, not that the percentage should be raised. *Rybicki*, 574 F. Supp. at 1160 n.2 (Grady, J., concurring in part, dissenting in part).

¹²⁷ *United Jewish Org. v. Carey*, 430 U.S. 144, 186 (1977)(Burger, C.J., dissenting). In fact "[e]very districting plan has a natural negative effect on some voters; and given the difficulty of predicting this natural effect, the Court has been unable to define as gerrymander any plan which exceeds by some percentage this unascertained natural level of dilution." Note, *An Answer to "The Other Half of Reynolds v. Sims,"* 14 GA. L. REV. 813, 817 (1980).

Courts have also found that overrepresentation by blacks does not preclude a finding of dilution. See, e.g., *Buskey v. Oliver*, 565 F. Supp. 1473, 1474-75 (M.D. Ala. 1983)(blacks made up only 39% of city's population yet held 44% of city council seats); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 347-48 (N.D. Tex. 1983)(court suggested that blacks should be allowed to elect 40% of city council though making up only 33% of population). This result is difficult to reconcile with the view that § 2 is "aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote." S. REP. No. 417, 97th Cong., 2nd Sess., 30 n.120, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 208.

¹²⁸ *Brantley v. Brown*, 550 F. Supp. 490, 496 (S.D. Ga. 1982). Although race may be considered, there are valid nondiscriminatory reasons for not taking such factors into consideration. *Id.* In fact, "the very idea of stacking districts so as to achieve a particular result tends to undermine the democratic process in general by making representatives less sensitive to shifts in public opinion." Note, *supra* note 127, at 825-26.

¹²⁹ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1570 (11th Cir. 1984)(candidates must run for specific posts based on residency); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984)(subdistrict residency requirement allowed whites to dominate city office); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 347 (N.D. Tex. 1983)(residency requirement coupled with segregated housing patterns resulted in white voter domination); *Boykins*, No. H77-0062(c), slip op. at 20 (same).

¹³⁰ See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364, 368, 383 (5th Cir. 1984)(city

large districts,¹³² district lines which separate cohesive neighborhoods,¹³³ and other practices.¹³⁴

had staggered terms for four-member city council); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 339-40 (N.D. Tex. 1983)(city charter provided for staggered terms for five council members).

¹³¹ See *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 340 (N.D. Tex. 1983). In *Terrell*, the city charter required all candidates for public office to own real property. Analogizing the requirement to the poll tax because it affected blacks more adversely, the court described the property requirement as a "direct governmentally sanctioned exclusion," even though defendants' witnesses testified that the requirement was not enforced. *Id.*

The Fifth Circuit has concluded that the "most obvious purpose for the creation of [a property requirement] is clearly discrimination." *Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981).

¹³² See *Boykins*, No. H77-0062(c), slip op. at 18. The existence of this factor enhances the lack of access by minorities to the political process by requiring more expensive campaigns to win. *Id.* Since blacks earn, on the average, less than half of the amount whites earn, a greater share of their income must go to campaign. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1570 (11th Cir. 1984); see also *infra* notes 144-145 and accompanying text (explaining how lack of money causes blacks to have less access).

¹³³ See, e.g., *Major*, 574 F. Supp. at 335-36, 353. In *Major*, the court stated that the challenged plan separated homogeneous black neighborhoods, but not similar white neighborhoods, resulting in distorted and irregularly-shaped districts. *Id.* Cohesive black neighborhoods share common political and socioeconomic interests based upon income, transportation, education and housing. *Id.* at 335. Compare *id.* (dividing black neighborhoods was factor in inferring dilution) with *Carstens v. Lamm*, 543 F. Supp. 68, 85 (D. Colo. 1982)(detrimental impact of split outweighed by benefit of increased minority population in district).

One district, in *Major*, when traced on a map of the city, resembled a duck's head. *Major*, 574 F. Supp. at 335. A similar situation in the Massachusetts state senatorial redistricting plan in 1812 resulted in the coining of the term "gerrymander." Governor Elbridge Gerry had supported a redistricting plan that newspaper caricatures represented as a salamander, which quickly became "gerrymander." III *DICTIONARY OF AMERICAN HISTORY* 175 (rev. ed. 1976). "Gerrymander" now "refers to discriminatory districting which operates unfairly to inflate the political strength of one group and defeats that of another." R. DIXON, *THE COURT, THE PEOPLE AND "ONE MAN, ONE VOTE," IN REAPPORTIONMENT IN THE 1970's* 7 (1971). Physical evidence of racial gerrymandering may itself furnish strong, objective proof of vote dilution. *Rybicki*, 574 F. Supp. at 1107-08.

In *Brantley v. Brown*, 550 F. Supp. 490 (S.D. Ga. 1982), however, the court accepted a plan which preserved militia district lines and city ward lines and was, consequently, more convenient to voters. *Id.* at 495, 497. The districts were compact and contiguous, and the court found that the plan submitted by the NAACP did not follow established militia or ward lines, which would have confused voters. *Id.* at 495-96. The court determined that it was under no obligation to maximize black voting strength. *Id.* at 497.

¹³⁴ E.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569-70 (11th Cir. 1984)(low number of black poll officials and failure of registrar to abide by state law enhanced lack of access); *Boykins*, No. H77-0062(c), slip op. at 11-12 (marriage records segregated by race, and circuit clerk's office staffed by "all white persons" until 1978).

E. Denial of Access to a Candidate Slating Process

"This factor, in some situations, could be of paramount importance."¹³⁵ The significance of this factor was noted by the Fifth Circuit in *Zimmer* in which the court considered lack of access to the political process in terms of access to the candidate slating process.¹³⁶ The United States Court of Appeals for the Eleventh Circuit has broadly defined "access to slating" as "the ability to run for office."¹³⁷

In most cases, courts have noted the absence of formal slating procedures or organizations in the challenged electoral scheme.¹³⁸ Racial discrimination in slating, however, may be inferred from the failure of minority candidates to win primary nominations,¹³⁹ or where racial discrimination prevents minority candidates from actively seeking general voter support.¹⁴⁰

It should be noted, however, that, consistent with the totality of the circumstances approach, the absence of formal or informal slating procedure or racial discrimination in slating does not preclude finding a section 2 violation or count against plaintiffs in the determination of whether an at-large system denies minority voters equal access to the political process.¹⁴¹

F. Effects of Discrimination in Education, Employment and Health

As noted earlier,¹⁴² past discrimination has been found to produce

See generally Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 *FORDHAM L. REV.* 93, 93-104 (1983)(setting forth voting procedures that may hinder minority electoral participation).

¹³⁵ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984).

¹³⁶ *See Zimmer*, 485 F.2d at 1305 (court listing this factor first in enumerating factors which may show dilution).

¹³⁷ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984).

¹³⁸ *E.g., id.* (court found no slating organization in the county); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 340 (N.D. Tex. 1983)(city had no candidate slating process); *Boykins*, No. H77-0062(c), slip op. at 20 (same).

¹³⁹ *See Boykins*, No. H77-0062(c), slip op. at 20 (court suggesting this may dilute minority voting strength, though admitting slating played no role in Hattiesburg elections). This proposition finds support in the House Report which states that "[a]n aggregate of objective factors should be considered, such as . . . discriminatory slating or the failure of minorities to win party nomination." H.R. REP. No. 227, at 30.

¹⁴⁰ *See United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 n. 40 (11th Cir. 1984)(citing *Perkins v. City of West Helena*, 675 F.2d 201, 209-10 (8th Cir. 1982)).

¹⁴¹ *Boykins*, No. H77-0062(c), slip op. at 21.

¹⁴² *See supra* note 76 and accompanying text.

lingering effects in the form of disparate educational, employment, income level and living conditions which adversely affect minority political participation.¹⁴³ Specifically, income and education facilitate access to the polls and knowledge of the candidates and issues involved in particular elections.¹⁴⁴ Also, the reduced level of income of minority groups bears directly on the funds available to minority candidates for use in organizing and conducting campaigns.¹⁴⁵ The presence of lingering effects in the form of depressed socioeconomic states gains added significance where at-large systems are also present. Because at-large districts are usually larger in size and population than single member districts, they necessarily require the expenditure of larger sums of money in order to sustain larger campaign organizations and publicity efforts.¹⁴⁶

According to the Senate Report, the plaintiff bears the burden of proof of demonstrating the existence of the lingering effects of past discrimination and a reduced level of minority political participation.¹⁴⁷ However, plaintiffs are not required to show a causal nexus between lingering effects and level of political participation; instead, a causal nexus is presumed.¹⁴⁸ Defendants therefore bear the burden of denying a causal nexus.¹⁴⁹

As to the nature of proof used in establishing the lingering effects of past discrimination, courts have generally allowed experts to testify

¹⁴³ S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.114, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 207; *see also* Moore v. Leflore County, No. GC 83-249-WK-O, slip op. at 10-11 (N.D. Miss. June 5, 1985)(adverse impact remains despite recent diminishment).

¹⁴⁴ *See* Boykins, No. H77-0062(c), slip op. at 24. An expert witness also testified that a depressed socioeconomic condition prevented blacks from forming coalitions with white voters and caused an outmigration of young black adults, thereby reducing the black percentage of the voting age population. *Id.* at 24-25.

¹⁴⁵ *See* Haywood County, 544 F. Supp. at 1127 (expert testifying to why it was more difficult for blacks to participate in countywide elections). An expert further testified that poverty prevents minority candidates from receiving good publicity, becoming well-known, meeting politicians and influential people, and joining local civic clubs. *Id.*; *see also* United States v. Marengo County Comm'n, 731 F.2d 1546, 1550-51, 1551 n.3 (court noting disparities in plumbing facilities, education, housing and per capita income).

¹⁴⁶ *See supra* notes 68, 69 and accompanying text.

¹⁴⁷ S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.114, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 207.

¹⁴⁸ *Id.*; *see also* United States v. Marengo County Comm'n, 731 F.2d 1546, 1568-69 (11th Cir. 1984)(adopting Senate Report approach); Buskey v. Oliver, 565 F. Supp. 1473, 1475 (M.D. Ala. 1983)(adverse impact is inference which flows from existence of lingering effects). *But see* Political Civil Voters Org. v. City of Terrell, 565 F. Supp. 338, 342 (N.D. Tex. 1983)(no inference drawn).

¹⁴⁹ United States v. Marengo County Comm'n, 731 F.2d 1546, 1569 (11th Cir. 1984).

regarding the relevant socioeconomic disparities between minority and white populations within the electoral districts.¹⁵⁰ In an effort to deny a causal nexus, defendants have attempted to show that the reduced minority political activity was the result of minority apathy and not the result of socioeconomic status. This argument has met with mixed results.¹⁵¹

G. Campaigns Characterized by Racial Appeals

Because overt racial appeals have become "unfashionable,"¹⁵² there have been few occurrences in recent years.¹⁵³ One occurrence, however, was noted by the court in *Boykins*, in which the plaintiffs introduced evidence of a verbal exchange which had taken place during a speech by the mayor to an all-white audience. One of the members of the audience was found to have made a racial slur while asking the mayor a question.¹⁵⁴ The court in *Boykins* also permitted lay witnesses to testify that whites had expressed racially-based opposition to the change in the form of government.¹⁵⁵

Although neither overt nor subtle racial appeals may be present, courts may still find evidence of campaigns characterized by racial appeals. An expert witness in *Boykins* testified concerning his study of campaign literature and rhetoric used in a recent election. He testified that certain "code words" such as "sectionalism" and the "threat of federal government or federal court intervention" were tantamount to the overt and explicit racist and segregationist speeches made during

¹⁵⁰ See, e.g., *Boykins*, No. H77-0062(c), slip op. at 22, 24-25 (expert testified to nature of disparities).

¹⁵¹ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1568-69 (11th Cir. 1984)(court rejecting "apathy" argument); *Major*, 574 F. Supp. at 351 n.31 (same). But see *United States v. Dallas County Comm'n*, 548 F. Supp. 794, 854-55 (S.D. Ala. 1982)(low black turnout result of apathy, not lower socioeconomic background).

¹⁵² *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)(quoting *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978)).

¹⁵³ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)(court found no evidence of overt or subtle racial appeals); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 347 (N.D. Tex. 1983)(same).

¹⁵⁴ *Boykins*, No. H77-0062(c), slip op. at 28 n.3.

¹⁵⁵ *Id.* at 27. One of the plaintiffs testified that he was personally subjected to racial slurs from white citizens while he campaigned for the change. Although defendants presented testimony from individuals who asserted that they had not personally observed incidents of racial appeal or influence, defendants offered no evidence to rebut the testimony that these incidents were witnessed by others. *Id.*

the civil rights era.¹⁵⁶ Thus, the "code word" device is apparently a method by which racial appeals can be made. Courts may also infer racial appeals from the continuing effects of past discrimination¹⁵⁷ and from a high degree of racial bloc voting and racial animus itself.¹⁵⁸ The absence of racial appeals, however, does not weigh heavily against a plaintiff.¹⁵⁹

H. Number of Minority Elected Officials

The extent to which minorities have been elected to office is another significant factor used to assess the dilutionary effect of an electoral scheme.¹⁶⁰ The text of section 2 expressly states, however, that proportional representation is not required.¹⁶¹ Although the absence of minority elected officials is an indication of a violation,¹⁶² the election of minority candidates does not preclude a finding that a challenged electoral plan violates section 2.¹⁶³

¹⁵⁶ *Id.* at 26-27. Another "code word" racial appeal was a reference to those who supported the change in form of government as "outsiders." *Id.* at 27; see generally Himelstein, *Rhetorical Continuities in the Politics of Race: The Closed Society Revisited*, THE SOUTHERN SPEECH COMMUNICATIONS JOURNAL 153, 156-66 (Winter 1983)(analyzing "code words" used in Hattiesburg, Mississippi referendum).

¹⁵⁷ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)(court inferring racial appeals from lingering effects of historical discrimination); see also *supra* notes 142-151 and accompanying text (discussing current status of lingering effects of past discrimination).

¹⁵⁸ See, e.g., *Boykins*, No. H77-0062(c), slip op. at 25 (court inferring racial appeals from these two occurrences).

¹⁵⁹ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

¹⁶⁰ See, e.g., *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 347 (N.D. Tex. 1983)(indicated importance of minority representation).

¹⁶¹ See *supra* note 54; see also *Brantley v. Brown*, 550 F. Supp. 490, 496 (S.D. Ga. 1982)(court recognizing plaintiffs' school district election plan was request for proportional representation).

¹⁶² See *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1551-52 (11th Cir. 1984)(one black candidate elected in history of county-wide elections); *Jones v. City of Lubbock*, 727 F.2d 364, 368 (5th Cir. 1984)(no successful minority candidate since city began recording race of candidates); *Major*, 574 F. Supp. at 341 (no black elected to statewide office this century); *Haywood County*, 544 F. Supp. at 1126 (no successful black candidate in county-wide elections).

¹⁶³ S. REP. NO. 417, 97th Cong., 2d Sess. 29 n. 115; *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571-72 (11th Cir. 1984); see also *Major*, 574 F. Supp. at 351 (election of black mayor was held of no significance); cf. *Busbee v. Smith*, 549 F. Supp. 494, 499 (D.D.C. 1982)(election of black congressman from district when black population was lower held of no significance), *aff'd mem.*, 103 S. Ct. 809 (1983).

The at-large election of black candidates may be attributable to one or both of two reasons. The success may be the result of political expediency, or fear that failure to

IV. OTHER FACTORS HAVING PROBATIVE VALUE

A. *Lack of Responsiveness to Minority Needs*

This factor is accorded less significance and legal weight under section 2's results standard than under the intent standard.¹⁶⁴ Plaintiffs need not establish a lack of responsiveness to succeed in a dilution claim.¹⁶⁵ A showing of unresponsiveness, however, may strengthen a plaintiff's claim of dilution.¹⁶⁶

The Eleventh Circuit has given two reasons for the limited significance of unresponsiveness under the results standard:

First, section 2 protects the access of minorities not simply to the fruits of government but to participation in the process itself. Accordingly, evidence that officials meet the functional needs of minority citizens does not overcome evidence that the minorities are excluded from political participation. Second, responsiveness is a highly subjective matter, and this subjectivity is at odds with the emphasis of section 2 on objective

elect a black will invite a dilution challenge. *Marengo County Comm'n*, 731 F.2d at 1572 (quoting *Zimmer*, 485 F.2d at 1307). A second reason is that the successful black candidate may have characteristics or qualities which are not transferable to other black candidates. *Campbell v. Gadsen County School Bd.*, 691 F.2d 978, 983 (11th Cir. 1982).

¹⁶⁴ Compare *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1572 (11th Cir. 1984) (evidence of unresponsiveness is of less significance) and *Jones v. City of Lubbock*, 727 F.2d 364, 381 (5th Cir. 1984) (same) with *Zimmer*, 485 F.2d at 1305 (lack of responsiveness makes "strong case" of dilution); see also *supra* note 35 and accompanying text.

In *Campbell v. Gadsen County School Bd.*, 691 F.2d 978, 983 (11th Cir. 1982), and *McMillan v. Escambia County*, 638 F.2d 1239, 1249 (5th Cir. 1981), the Eleventh and Fifth Circuits stated that the unresponsiveness to minority needs was "irrelevant."

¹⁶⁵ See S. REP. NO. 417, 97th Cong., 2d Sess. 29 & n.116, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 207 n.116 (disapproving excessive reliance on responsiveness).

One author argues that the amount of responsiveness to minority needs should not be used to determine lack of access to the political process. See Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 YALE L.J. 974, 985 (1982) (unresponsiveness requirement would allow purposeful discrimination as long as elected officials were responsive to minority needs). But see *United States v. Dallas County Comm'n*, 548 F. Supp. 794, 919 (S.D. Ala. 1982) (proof of unresponsiveness essential element of plaintiffs' prima facie case).

¹⁶⁶ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1572 (11th Cir. 1984) (interpreting Senate Report); *Boykins*, No. H77-0062(c), slip op. at 30, 32 (citing *Cross v. Baxter*, 604 F.2d 875, 882 (5th Cir. 1979)).

The fact that a city may have complied with court orders and minority demands does not disprove unresponsiveness. It proves only that litigation was required to remove discrimination in the area. *Boykins*, No. H77-0062(c), slip op. at 32 (citing *Kirksey v. Bd. of Supervisors*, 554 F.2d at 146).

factors.¹⁶⁷

Unresponsiveness suggests that elected officials are willing to discriminate against minorities and are not accountable to minority interests.¹⁶⁸ Courts have found official unresponsiveness manifested in the location and staffing of polling places,¹⁶⁹ and in the provision of drainage, water, sewer, cemeteries, fire and police protection, medical services, housing, paving of streets, future planned expenditures, zoning permits, city hiring,¹⁷⁰ and city appointments of minorities.¹⁷¹ Other less tangible acts of unresponsiveness include hostility to minority needs by city officials and the degree to which minorities have complained about city services.¹⁷² If the plaintiffs show pervasive official unresponsiveness to minority needs, the defendants must then bear the burden of demonstrating that past unresponsiveness is no longer indicative of present governmental unresponsiveness.¹⁷³

The Fifth Circuit has found it appropriate to weigh the effects of federal funding,¹⁷⁴ minority protests or demonstrations,¹⁷⁵ and the specter of litigation in considering a city's responsiveness to minority interest.¹⁷⁶

¹⁶⁷ United States v. Marengo County Comm'n, 731 F.2d 1546, 1572 (11th Cir. 1984). "[S]ection 2 focuses not on whether minority groups receive adequate public services, but on whether minorities have an equal right to *participate* in the political process." *Id.* at 1565 (emphasis in original)(citing S. REP. NO., 417, 97th Cong., 2d Sess. at 36).

¹⁶⁸ United States v. Marengo County Comm'n, 731 F.2d 1546, 1572 (11th Cir. 1984)(citing Rogers v. Lodge, 458 U.S. 613, 625 n.9 (1982)).

¹⁶⁹ See also *supra* note 134 and accompanying text.

¹⁷⁰ See Jones v. City of Lubbock, 727 F.2d 364, 382 & n.12 (5th Cir. 1984)(court expressing concern that minorities held few highly paid or responsible positions, though admitting they were well represented in city workforce); *Boykins*, No. H77-0062(c), slip op. at 32 (black employment by city disproportionately low in jobs of responsibility and high pay); see also *id.* at 31 (unresponsiveness included having segregated public facilities until 1973).

¹⁷¹ See, e.g., Political Civil Voters Org. v. City of Terrell, 565 F. Supp. 338, 346 (N.D. Tex. 1983)(inadequate minority representation for city appointments). But see Brantley v. Brown, 550 F. Supp. 490, 495-96 (S.D. Ga. 1982)(conduct of city officials held not unresponsive). See also *City of Terrell*, 565 F. Supp. at 342-46 (discussion of all factors indicating unresponsiveness).

¹⁷² *Boykins*, No. H77-0062(c), slip op. at 31, 37 (conduct of city held not unresponsive).

¹⁷³ Cross v. Baxter, 604 F.2d 875, 883 (5th Cir. 1979).

¹⁷⁴ See Jones v. City of Lubbock, 727 F.2d 364, 381 (5th Cir. 1984)(city's responsiveness resulted from receiving federal funds targeted for minority areas).

¹⁷⁵ See *id.* at 382 & n.14 (city's responsiveness resulted from protests and demonstrations).

¹⁷⁶ See *id.* at 382 (action taken by city during litigation not determinative of true past and future responsiveness); *Boykins*, No. H77-0062(c), slip op. at 31 (same).

Both the Fifth and Eleventh Circuits, which hear the majority of dilution challenges, have indicated that evidence of racially polarized voting¹⁷⁷ alone may indicate unresponsiveness.¹⁷⁸ According to the Fifth Circuit, racially polarized voting frees elected officials from political reprisal for unresponsiveness to minority interests and indicates that race is indeed an issue in the political system.¹⁷⁹ The Eleventh Circuit has found that continued polarization provides strong evidence that elected officials are not meeting minority political needs.¹⁸⁰

B. Tenuousness of Policy Underlying Electoral System

The strength of a given political jurisdiction's policy in favor of a particular electoral system is admittedly a more relevant consideration under the intent standard than under the results standard of section 2.¹⁸¹ However, as noted by the Eleventh Circuit, the strength of the underlying policy is still relevant because a finding of discriminatory intent may provide circumstantial evidence that the particular electoral device produces discriminatory results.¹⁸² Furthermore, a tenuous justification for a policy may also indicate that the policy itself is unfair.¹⁸³

In order to assess the tenuousness of a policy supporting a particular electoral system, courts have examined departures from the usual procedural sequence or the specific chain of events culminating in a legislative decision implementing¹⁸⁴ or maintaining the system.¹⁸⁵ Both

¹⁷⁷ See *supra* notes 88-105 and accompanying text.

¹⁷⁸ See *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984)(polarized voting best evidence of unresponsiveness); *Jones v. City of Lubbock*, 727 F.2d 364, 381 (5th Cir. 1984)(unresponsiveness is inference which flows from racially polarized voting).

¹⁷⁹ *Jones v. City of Lubbock*, 727 F.2d 364, 381 (5th Cir. 1984).

¹⁸⁰ *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984). Although a combination of polarized voting and unresponsiveness can make a strong case of dilution, see *Nevett v. Sides*, 571 F.2d 209, 223 (5th Cir. 1978), the absence of unresponsiveness does not negate the inferences which flow from polarization. *Jones v. City of Lubbock*, 727 F.2d 364, 381 (5th Cir. 1984). Whether or not elected officials ignore minority interests, polarization nevertheless frees them from political reprisal. *Id.* (citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982)).

¹⁸¹ See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)(system's adoption shortly after *Brown v. Board of Education* implied tenuous policy). But see *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 341 (N.D. Tex. 1983)(original justification for at-large system not tenuous).

¹⁸² *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

¹⁸³ *Id.* (citing *Joseph v. Hendrix*, 559 F.2d 1265, 1269-70 (5th Cir. 1977)).

¹⁸⁴ See, e.g., *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 341 (N.D. Tex. 1983). In *City of Terrell*, the court found the policy tenuous because a refer-

the courts¹⁸⁶ and the legislative history¹⁸⁷ of amended section 2 have indicated that this factor's importance has been diminished under the results test.

V. CONCLUSION

By codifying in section 2 the language contained in *White v. Regester*, Congress reestablished the results test previously discredited by the Court in *Mobile v. Bolden*. Although amended section 2 does not prevent plaintiffs from alleging and proving purposeful discrimination in the adoption or maintenance of an electoral scheme,¹⁸⁸ because of the inherent difficulties in proving purposeful discrimination,¹⁸⁹ most cases decided under amended section 2 have relied upon the results test.¹⁹⁰

endum which had approved a change from the at-large method to single-member districts was set aside by the city council. A subsequent referendum resulted in the defeat of the proposal. *Id.*

¹⁸⁶ See, e.g., *id.* (city's reason for maintaining system found tenuous); *Boykins*, No. H77-0062(c), slip op. at 38 (maintenance of commission form of government found tenuous).

¹⁸⁸ See *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)(questioning probative value); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984)(same).

¹⁸⁷ See S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.117, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 207 n.117 (questioning probative value).

¹⁸⁸ See *Jones v. City of Lubbock*, 727 F.2d 364, 369 (5th Cir. 1984)(plaintiffs challenged system for both purposeful discrimination and discriminatory result); *Buskey v. Oliver*, 565 F. Supp. 1473, 1482 (M.D. Ala. 1983)(same).

¹⁸⁹ The problem with a purposeful discrimination claim is one of proof. If the electoral plan was established several decades ago, proof of motivations, thoughts, and views of public officials is difficult, if not impossible. S. REP. NO. 417, 97th Cong., 2d Sess. at 36; see *Jones v. City of Lubbock*, 727 F.2d 364, 370-72 (5th Cir. 1984)(difficulty determining thoughts and motivations of persons 75 years ago); *Boykins*, No. H77-0062(c), slip op. at 4-5 (at-large commission form of government established 70 years ago). Current public officials have an interest in the status quo and are therefore able to provide nonracial reasons for the continued use of the system. S. REP. NO. 417, 97th Cong., 2d Sess. at 37. Also, an inquiry into public officials' motivations can erode any racial progress in the community by making such accusations. *Id.* at 36.

¹⁹⁰ E.g., *Jones v. City of Lubbock*, 727 F.2d 364, 385-86 (5th Cir. 1984)(aggregate of factors indicated severe impact on minorities); *Boykins*, No. H77-0062(c), slip op. at 39 (maintenance of at-large system resulted in blacks being denied access to political process); *Moore v. Leflore County*, No. GC 83-249-WK-O, slip op. at 22 (N.D. Miss. June 5, 1985)(upholding redistricting plans as not violative of amended § 2). But see *Buskey v. Oliver*, 565 F. Supp. 1473, 1482-85 (M.D. Ala. 1983)(relying solely on finding of purposeful discrimination); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 349 (N.D. Tex. 1983)(same).

As can be gleaned from the foregoing analysis, the courts have uniformly treated each factor liberally from the standpoint that they have shown a willingness to examine a wide range of evidence proffered in support of a given objective factor. For example, the use of various methods of statistical analysis has proved effective in demonstrating the existence of racial bloc voting¹⁹¹ in contrast to the more conservative approach of requiring direct testimony as to racially motivated vote casting.

On another level, as explained by the Senate Report, the objective factors are to be, and have been, flexibly applied¹⁹² and indeed courts have found some to be interrelated; that is, a finding of one factor may tend to support the finding of others.¹⁹³ The totality of the circumstances approach has further underscored the deferential treatment given by the courts to vote dilution claims. The result of the foregoing standards has produced a number of successful in-court challenges. Also significant has been the occurrence of a number of out-of-court settlements, favorable to plaintiffs, by jurisdictions wishing to avoid the expenditure of considerable amounts of time and money on what is viewed as a lost cause.¹⁹⁴

In regard to at-large or multimember districts in general, the Fifth Circuit has found that "even under the best of circumstances, at-large districts tend to debase the value of a minority's political strength."¹⁹⁵ Although an at-large scheme "achieves the highest possible integration of racial and other minorities, [it] simultaneously provides such minorities with the least opportunity to elect representatives of their choice."¹⁹⁶ Given the natural tension between the results-based approach of amended section 2 and the view that a right of proportional representation is not to be inferred from its language,¹⁹⁷ it will be in-

¹⁹¹ See *supra* notes 95-98 and accompanying text.

¹⁹² S. REP. NO. 417, 97th Cong., 2d Sess. at 28-29.

¹⁹³ See *supra* notes 100, 104, 179-180 and accompanying text.

¹⁹⁴ See *The Clarion Ledger*, June 17, 1984, at C1, col. 1 (citing municipalities which had reached out-of-court settlements favoring single member districts); *id.* May 16, 1984, at A1, col. 5 (Greenville, Mississippi, changing from at-large to ward system based upon out-of-court agreement reached after *Boykins*).

¹⁹⁵ *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984).

¹⁹⁶ *Rybicki*, 574 F. Supp. at 1153. The legislative history indicates that an at-large election scheme is one of the most effective methods of diluting black voting strength. See H.R. REP. NO. 227, 98th Cong., 1st Sess. 18 (1981).

¹⁹⁷ See *Velasquez v. City of Abilene*, 725 F.2d 1017, 1024 (5th Cir. 1984) (Higginbotham, J., concurring) (noting tension between impact test of amended § 2 and rejection of right to proportional representation and its implication as to definitional content of "discrimination" as term is used in § 2); see also Blumstein, *Defining and Proving Race*

teresting to monitor subsequent decisions under amended section 2 in order to determine whether "the opportunity to elect representatives of their choice" will, in real terms, translate into a right of proportional representation.

David Collier Nagle

Discrimination: Perspectives on The Purpose vs. Results Approach From The Voting Rights Act, 69 VA. L. REV. 633, 705 (1983)(emphasis should be given to "process" rather than outcome produced by operation of election schemes).

RECENT DECISIONS

CONSTITUTIONAL LAW — COMMERCIAL SPEECH — INTRASTATE LIQUOR ADVERTISING BAN DOES NOT VIOLATE FIRST AMENDMENT WHERE SUFFICIENT REASON EXISTS TO BELIEVE ADVERTISING IS DIRECTLY RELATED TO INCREASED CONSUMPTION

Plaintiffs, the editor and business manager of *The Daily Mississippian*,¹ filed a suit² against the city of Oxford, its mayor and its aldermen in the United States District Court for the Northern District of Mississippi, challenging the constitutionality of Mississippi's statutory prohibition of the advertisement of certain alcoholic beverages.³ The district court upheld the statute as constitutional, reasoning that

¹ *The Daily Mississippian* is a student newspaper of the University of Mississippi at Oxford. *Dunagin v. City of Oxford*, 489 F. Supp. 763, 765 (N.D. Miss. 1980).

² The plaintiffs brought the suit on behalf of all past, present, and future editors and business managers of *The Daily Mississippian*. *Id.* at 765 n.1.

³ *Id.* at 765-66. MISS. CODE ANN. § 97-31-1 (1972) makes it unlawful for anyone to advertise alcoholic liquors within the state or to circulate any newspaper in which such an advertisement appears. *Id.* Violation may result in injunctive suppression of future advertising or in criminal sanctions, including imprisonment of up to three months for a first offense. See MISS. CODE ANN. § 97-31-3 (1972). The advertising ban covers "alcoholic, intoxicating or spirituous liquors, or intoxicating bitters or other drinks which if drunk to excess, will produce intoxication, including among others, brandy, whisky, rum, gin, ale and porter." *Id.* In its original version, the statute specifically included beer among the list of beverages whose advertisement was forbidden. See *id.* § 2025 (1930). The Legislature later deleted it from the list. See *id.* § 2664 (1942). The city of Oxford could enforce § 97-31-1 through an ordinance that made state-law misdemeanors offenses against the city. *Dunagin v. City of Oxford*, 489 F. Supp. 763, 766 n.3 (N.D. Miss. 1980).

Plaintiffs initiated the action after receiving a letter from the Oxford city attorney stating that the city would seek injunctive relief if the newspaper continued to advertise beer. The defendants conceded that the challenged statute did not prohibit the advertising of beer and defendants moved to dismiss for lack of controversy. Consequently, the plaintiffs amended their complaint, alleging that they desired to advertise liquor other than beer but were threatened by the city's position as reflected in the letter. *Id.* at 766-67. Because the lawsuit challenged a state statute, the state was allowed to intervene as a defendant. *Id.* at 766.

liquor advertising was not protected by the first amendment⁴ and that the twenty-first amendment gave the state power to prohibit liquor advertising.⁵ Meanwhile, plaintiff Lamar Outdoor Advertising and fifty-five other media organizations⁶ filed an action against the Mississippi State Tax Commission⁷ in the United States District Court for the Southern District of Mississippi, raising a similar challenge to Mississippi's restrictions on liquor advertising.⁸ Although the district court recognized the power of the state under the twenty-first amendment to control liquor regulation,⁹ the court held that the state's regulatory scheme banning liquor advertising was an unconstitutional violation of the first amendment protection afforded commercial speech.¹⁰ On ap-

⁴ *Dunagin v. City of Oxford*, 489 F. Supp. 763, 771-72 (N.D. Miss. 1980). Looking to Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the district court noted that a state may regulate commercial speech — advertising — that promotes unlawful activity. The court observed that the advertisement of liquor could encourage consumers in "dry" counties of the state to violate the law by purchasing liquor in "wet" counties for transportation home. Concluding that the advertising would therefore promote activity illegal in a substantial portion of Mississippi, the court held that it was not protected by the first amendment and could be absolutely banned. *Dunagin* 489 F. Supp. at 771-72.

⁵ *Dunagin v. City of Oxford*, 489 F. Supp. 763, 774 (N.D. Miss. 1980).

⁶ Plaintiffs were outdoor advertising, newspaper, television, and radio businesses operating in Mississippi. *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 539 F. Supp. 817, 818 n.1. (S.D. Miss. 1982).

⁷ Defendants were the Mississippi State Tax Commission, the individual commissioners, the Commission's Alcoholic Beverage Control Division, and Mississippi's attorney general. Each was responsible for enforcing at least part of the Mississippi liquor advertising ban. *Id.* at 818 n.2.

⁸ *Id.* at 818. As in *Dunagin*, plaintiffs attacked Miss. CODE ANN. § 97-31-1 (1972). See *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 539 F. Supp. 817, 849 (S.D. Miss. 1982); see also *supra* note 3. The *Lamar* plaintiffs also challenged Miss. CODE ANN. §§ 67-1-85 and 67-1-37(e) (Supp. 1980) (giving State Tax Commission power to make rules prohibiting liquor advertising "in any class of media"), as well as three regulations promulgated by the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

One of the challenged rules, the Division's Regulation 6, provided that no person, firm, or corporation could originate advertisements dealing with alcoholic beverages in the state. It was the Division's policy not to enforce the liquor advertising ban against anyone whose central place of publication or dissemination of liquor advertisements was outside Mississippi. This policy was based on a perception that the state lacked jurisdiction over out-of-state advertisers. See *Lamar*, 539 F. Supp. at 819-21 & n.7.

⁹ *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 539 F. Supp. 817, 823 (S.D. Miss. 1982). The district court stated that a presumption of validity exists if the state regulations are reasonable and are rationally related to the furtherance of legitimate state interests. *Id.* at 824.

¹⁰ *Id.* at 826-29. The court employed the analysis set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and held that the state's regula-

peal, the cases were consolidated,¹¹ and the United States Court of Appeals for the Fifth Circuit, *held*, affirmed the judgment of the northern district, and reversed the judgment of the southern district. Mississippi's intrastate liquor advertising ban does not violate the first amendment where sufficient reason exists to believe that advertising is directly related to increased consumption. *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

Commercial speech¹² has traditionally been afforded less than full first amendment protection¹³ and has always been subject to substantial governmental regulation.¹⁴ In the 1940's, the United States Supreme Court developed the commercial speech doctrine, which provided that when the primary purpose of speech was commercial, it fell within a category of speech not protected by the first amendment.¹⁵

tory scheme failed to directly advance the governmental interest in controlling liquor consumption. *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 539 F. Supp. 817, 826-29 (S.D. Miss. 1982). See *infra* notes 34-42 and accompanying text for a discussion of *Central Hudson*.

¹¹ See *Dunagin v. City of Oxford*, 718 F.2d 738, 740 n.2 (5th Cir. 1983). The defendants in *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 539 F. Supp. 817 (S.D. Miss. 1982), appealed to the United States Court of Appeals for the Fifth Circuit, and a 3-judge panel of the Fifth Circuit affirmed the southern district court's decision that the state's regulations were unconstitutional. See *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 701 F.2d 314, 316, 334 (5th Cir. 1983). The same panel reversed per curiam the northern district court's holding in *Dunagin v. City of Oxford*, 489 F. Supp. 763 (N.D. Miss. 1980). See *Dunagin v. City of Oxford*, 701 F.2d 335, 336 (5th Cir. 1983). A majority of judges in active service with the Fifth Circuit ordered en banc rehearings, *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 701 F.2d 335, 335 (5th Cir. 1983), *Dunagin v. City of Oxford*, 701 F.2d 336, 337 (5th Cir. 1983), because the opinions initiated a conflict with the rule in another circuit. See *infra* notes 72-85 and accompanying text.

¹² Commercial speech has been defined as speech "which does no more than propose a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973), and as "speech of any form that advertises a product or service for profit or for business purpose." J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 923 (2d ed. 1983) [hereinafter cited as NOWAK].

¹³ Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971).

¹⁴ NOWAK, *supra* note 12, at 923.

¹⁵ See *id.* at 924. The notion that commercial speech was outside the protection of the first amendment had its genesis in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), a decision that Justice Douglas later called "casual, almost offhand." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). One critic has argued that in *Chrestensen* the Supreme Court, "without citing precedent, historical evidence, or policy considerations, . . . read commercial speech out of the first amendment." Redish, *supra* note 13, at 450.

In *Chrestensen*, respondent tried to circumvent an ordinance which prohibited the

Over the years the doctrine was weakened, particularly by decisions which began to examine the content of the speech rather than the purpose for it.¹⁶

It was not until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹⁷ however, that the Supreme Court plainly extended first amendment protection to purely commercial speech.¹⁸

distribution of commercial advertising matter in the streets by having a political protest printed on the back of handbills advertising his for-profit submarine exhibition. When the respondent tried to distribute the handbills, the police restrained him. *Chrestensen*, 316 U.S. at 52-53. The Court stated that although the Constitution imposed certain restraints on government regulation of the dissemination of ideas, it imposed no such restraint on government regulation of "purely commercial advertising." *Id.* at 54. Furthermore, since the submarine owner's purpose in affixing the political protest to his commercial handbill was to evade the ordinance, it was proper to invoke the ordinance against his conduct. *Id.* at 55; see also *Breard v. City of Alexandria*, 341 U.S. 622, 633 (1951)(upheld prohibition on door-to-door magazine subscription sales).

¹⁶ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964)(editorial comment in paid advertisement is protected).

As early as the year after *Chrestensen*, the Court refused to apply the doctrine to advertising involving religious activities. See *Martin v. Struthers*, 319 U.S. 141, 142, 149 (1943)(advertisement of religious meeting protected); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)(advertisement of religious material protected).

In *Bigelow v. Virginia*, 421 U.S. 809, 818-21 (1975), the *Chrestensen* doctrine of non-protection for commercial speech was almost completely abrogated. In *Bigelow*, a Virginia newspaper editor who published advertisements for an out-of-state abortion referral service was convicted of violating a Virginia statute which prohibited advertisements concerning abortions. *Id.* at 811. The United States Supreme Court reversed the conviction, holding that such a statute violated first amendment rights where the advertisement conveyed factual information of clear public interest and value to a diverse audience. *Id.* at 822-25. Although the Court held that commercial speech was not totally without first amendment protection, it did not decide how far that protection would extend when the commercial speech related to activities that the state could legitimately regulate. *Id.* at 825. This issue was later presented to the Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 760 (1976); see also *Friedman v. Rogers*, 440 U.S. 1, 16 (1979)(state can restrict optometrists' use of trade names); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-57 (1978)(state can restrict in-person solicitation by attorneys); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977)(state cannot indiscriminately forbid all attorney advertising). See generally Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 207-22 (1976)(development and demise of *Chrestensen* doctrine).

¹⁷ 425 U.S. 748 (1976).

¹⁸ See *id.* at 758-62. Though *Bigelow v. Virginia*, 421 U.S. 809 (1975), had concerned commercial speech, the independent constitutional right to privacy supporting abortion was also implicated in that case. See Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 724 n.29 (1982); see also *supra* note 16. Because of this factor in *Bigelow*, the Supreme Court later observed that some fragment of the notion that commercial speech fell outside the coverage of the first amendment may have per-

Virginia Pharmacy involved a statute declaring it unprofessional conduct for a licensed pharmacist to advertise prescription drug prices.¹⁹ In holding that the statute violated the first amendment,²⁰ the Court pointed out that the commercial speech doctrine was a simplistic approach of doubtful validity²¹ and that speech "which does no more than propose a commercial transaction"²² was not so far removed from any "exposition of ideas" that it lacked all constitutional protection.²³ Rather, the Court held that such protection was justified by society's interest in the free flow of information.²⁴ The Court did not, however, hold that commercial speech could never be regulated in any way.²⁵ Permissible restrictions specifically reaffirmed by the Court²⁶ included the prohibition of false or misleading speech²⁷ and the prohibition of

sisted. *Virginia Pharmacy*, 425 U.S. at 760.

¹⁹ *Virginia Pharmacy*, 425 U.S. at 749-50. Consumers of prescription drugs brought the action challenging the validity of VA. CODE § 54-524.35 (1974). Because only a licensed pharmacist could dispense prescription drugs, and because any pharmacist advertising his price could have his license revoked by the board, the statute effectively forbade any advertising of prescription drug prices. *Virginia Pharmacy*, 425 U.S. at 749-53.

²⁰ *Virginia Pharmacy*, 425 U.S. at 770.

²¹ *Id.* at 759.

²² *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

²³ *Virginia Pharmacy*, 425 U.S. at 762 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

²⁴ *Virginia Pharmacy*, 425 U.S. at 770. The Court noted that, in general, this interest was very strong, *id.* at 764, and explained that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Id.* at 765. Such information would allow the public to make intelligent, well-informed economic decisions, and thereby aid in the proper allocation of resources in a free enterprise system. *Id.*

²⁵ *Id.* at 770-71 & n.24.

²⁶ *Id.* at 770-73. The majority suggested that there are permissible forms of commercial speech regulation, and listed "a few." The Court noted, however, that those listed were not before the Court, and therefore were not foreclosed by its decision. *Id.* at 770.

²⁷ *Id.* at 771. The Court pointed out that the first amendment "does not prohibit the state from insuring that the stream of commercial information flow cleanly as well as freely," *id.* at 772, and that "untruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.* at 771. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (false statements and lies not protected).

More than a decade before *Virginia Pharmacy*, the Court had determined that the Constitution requires tolerance of some false statements made in criticism of public officials, lest the exercise of free speech be inhibited and the vigor of public debate dampened. See *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). The *Virginia Pharmacy* Court, however, saw no such compelling reason to prevent states from regulating false or deceptive commercial speech. The Court reasoned that since advertising was considered

speech proposing an illegal transaction.²⁸ Restrictions on time, place, and manner²⁹ were also reaffirmed, provided that they left ample alternative channels for communication of the information,³⁰ could be justified without reference to the content of the speech,³¹ and served a significant government interest.³²

essential to commercial profits, it was not likely to be chilled by proper regulation. Further, since commercial speech was easily verified by its disseminator and was more "durable" than other types of speech, it was less necessary to tolerate inaccurate or misleading statements for fear of silencing the speaker. See *Virginia Pharmacy*, 425 U.S. at 771 & n.24. For later cases concerning regulation of misleading commercial speech, see *Friedman v. Rogers*, 440 U.S. 1, 12-15 (1979)(misleading optometrist trade names can be prohibited); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)(misleading attorney advertising is unprotected). But cf. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977)(remedy for misleading speech is not enforced silence). See generally Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. Rev. 775, 775-805 (1979)(definition of deceptive commercial speech examined).

²⁸ *Virginia Pharmacy*, 425 U.S. at 772.

²⁹ *Id.* at 771. The Court noted that it had often approved such restrictions. *Id.*; see, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)(first amendment allows evenly applied time, place, and manner restrictions).

³⁰ *Virginia Pharmacy*, 425 U.S. at 771; see *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980)(reasonable restrictions must leave ample routes open for communication).

³¹ *Virginia Pharmacy*, 425 U.S. at 771; see, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)(lawful expression cannot be restricted on basis of content). But see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-72 (1976)(opinion of Stevens, J., joined by Burger, C.J., White and Rehnquist, JJ.)(content of sexually explicit films justifies time, place, and manner restrictions).

³² *Virginia Pharmacy*, 425 U.S. at 771. For examples of significant government interests, see *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981)(improving traffic safety and city appearance); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978)(protecting public from attorney solicitation); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972)(preventing noise near schools). But see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 699-702 (1977)(preventing embarrassment and discouraging sexual activity among minors); *Schneider v. State*, 308 U.S. 147, 160 (1939)(keeping streets clean).

In *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-97 (1977), the Court applied the *Virginia Pharmacy* test for time, place, and manner restrictions to a township ordinance which prohibited the posting of real estate "for sale" signs. In holding that the ordinance violated the first amendment, the Court pointed out that the available alternative communication channels involved more cost and less autonomy, were less likely to reach people, and were less effective. *Id.* at 93, 97. Furthermore, the Court stated that since the ordinance was not actually concerned with the manner or place of the speech and since it was not aimed at signs generally, but at a particular type of sign, it was a content-based restriction. *Id.* at 93-94. The Court concluded that although the governmental purpose in enacting the ordinance was an important one — stemming the flight of white homeowners from a racially integrated neighborhood — the evidence failed to establish that the ordinance was necessary to achieve that purpose. *Id.*

To determine whether the regulation at issue was constitutionally permissible, the *Virginia Pharmacy* Court adopted a balancing approach, weighing the first amendment value of the speech³³ against the government interest asserted in support of the regulation.³⁴ The Court concluded that the advertising ban did not directly affect the government's interest one way or the other,³⁵ and held that it violated the first amendment.³⁶

The *Virginia Pharmacy* approach was incorporated into the test for commercial speech regulations articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.³⁷ In considering whether a state's absolute ban on promotional advertising by electric utilities violated first amendment guarantees,³⁸ the Court adopted a

at 94-96.

³³ *Virginia Pharmacy*, 425 U.S. at 762-65. The Court noted that society generally "may have a strong interest in the free flow of commercial information," and that such information was important in the making of private economic decisions. *Id.* at 764-65; see *supra* note 24. The Court observed that a particular consumer's interest in commercial information could be keener than his interest in political debate. Moreover, those hit hardest by the suppression of prescription drug price information were the aged, who often spent a disproportionate amount of their income on prescription drugs but who were the least able to shop comparatively. *Virginia Pharmacy*, 425 U.S. at 763. Furthermore, the Court stated that an advertiser is not disqualified from first amendment protection merely because his interest in commercial advertisement is purely economic and pointed out that while the interests of parties to a labor dispute are primarily economic, their comments on the merits of such a dispute had long been considered protected. *Id.* at 762.

³⁴ *Id.* at 766-69. Justifications for the advertising ban related primarily to the state's interest in maintaining a high degree of professionalism among licensed pharmacists. Petitioners argued that price advertising would result in aggressive price competition that would detrimentally affect the rendering of professional services by pharmacists. Although the Court recognized the strength of the justifications, it stated that they were greatly undermined by the fact that high professional standards were guaranteed, to a substantial degree, by Virginia's close regulation of pharmacists. *Id.*

³⁵ *Id.* at 769. The Court pointed out that the ban affected the pharmacists' professional standard only through the reactions the information would presumably stimulate in the people, such as customers choosing low-cost, low-quality service; customers responding to costly and excessive advertising, and later paying the price; customers losing respect for the profession. *Id.* at 769-70. The Court rejected this "paternalistic approach," reasoning that the choice between protecting people by keeping them ignorant, and informing people capable of perceiving their own best interests was not a decision for the state; that choice had already been made by the first amendment. *Id.* at 770; cf. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 355 (1977) (some accurate information is better than no information).

³⁶ *Virginia Pharmacy*, 425 U.S. at 770.

³⁷ 447 U.S. 557 (1980).

³⁸ *Id.* at 558-59. During a fuel shortage in 1973, the New York Public Service Com-

four-part analysis similar in form to that used in earlier commercial speech cases.³⁹ The Court stated that at the outset there would be a determination of whether the communication being regulated concerned lawful activity and was not misleading.⁴⁰ If the answer was "no," further inquiry would be unnecessary, since misleading commercial speech or that concerning illegal activity enjoys no first amendment protection.⁴¹ The second step required a determination of whether the asserted government interest was substantial. Failure to satisfy this inquiry would cause the regulation to fall.⁴² The final two stages of the analysis focused on the regulation itself to determine whether it directly advanced the asserted government interest⁴³ and whether it was more extensive than necessary to serve that interest.⁴⁴ In applying the four-part test in *Central Hudson*, the Court stated that the advertisements at issue were neither misleading, inaccurate, nor related to illegal activity, that the state's interest in conserving energy was substantial and that the state's interest was directly advanced

mission ordered all electric utilities to cease any advertising promoting the use of electricity. After the shortage had eased, the Commission continued the ban and declared all such advertising contrary to the national policy of conserving energy. *Id.*

³⁹ *Id.* at 566.

⁴⁰ *Id.*

⁴¹ *Id.* at 563-64. The Court noted that the basis for first amendment protection of commercial speech was the "informational function of advertising"; therefore, there could be no constitutional objection to the suppression of inaccurate commercial messages or those pertaining to illegal activity. *Id.* at 563-64; see, e.g., *Friedman v. Rogers*, 440 U.S. 1, 12-15 (1979)(misleading optometrist trade names not protected); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973)(speech proposing illegal transaction not protected). The Court pointed out that content-based regulations, usually prohibited by the first amendment, were permissible when commercial speech was involved. In the first place, commercial speakers had extensive knowledge of the market and their products and were better able to evaluate the veracity of their message and the legality of the underlying transaction. Secondly, because commercial advertising was linked to economic self-interest, it was not likely to be crushed by overbroad regulation. *Central Hudson*, 447 U.S. at 564 n.6; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)(advertiser can better determine whether speech is truthful; advertising linked to commercial well-being).

⁴² *Central Hudson*, 447 U.S. at 566.

⁴³ *Id.* at 566. The Court noted that ineffective or remote support for the state's interest would not be sufficient to justify the restriction. *Id.* at 564. Compare *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-09 (1980)(billboard ban advanced state's interest in traffic safety despite insufficient record evidence) with *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977)(state failed to show by record evidence that regulation directly advanced state's interest).

⁴⁴ *Central Hudson*, 447 U.S. at 566; see also *In re Primus*, 436 U.S. 412, 438 (1978)(speech restrictions must be narrowly drawn); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977)(same).

by the advertising ban.⁴⁵ The Court concluded, however, that a complete ban was too extensive, reasoning that the regulation suppressed all promotional speech regardless of the effect on energy consumption.⁴⁶

Although the heightened level of scrutiny for commercial speech regulations is a fairly recent development, courts have traditionally recognized that the twenty-first amendment⁴⁷ gives the states broad power to enact intrastate liquor regulations.⁴⁸ The Supreme Court, however, has limited the amendment's sweep when other constitutional challenges are also at issue.⁴⁹

⁴⁵ *Central Hudson*, 447 U.S. at 566-69.

⁴⁶ *Id.* at 570. The Court noted that since the regulation was so extensive, it suppressed speech which would promote services to reduce energy consumption. Since the state failed to show that a more limited restriction would not adequately serve its interest in conserving energy consumption, the Court invalidated the ban to the extent that it suppressed speech that did not impair the state's interest. *Id.* The Court noted that it reviewed "with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy Indeed, in recent years [the] Court [had] not approved a blanket ban on commercial speech unless the expression was . . . deceptive or related to unlawful activity." *Id.* at 566 n.9; *see, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-02 (1977)(contraceptive advertising ban held unconstitutional); *cf. Bigelow v. Virginia*, 421 U.S. 809, 811, 829 (1975)(abortion advertising ban unconstitutional).

⁴⁷ The twenty-first amendment provides in pertinent part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. The purpose of the amendment was to end national prohibition and restore state control over intoxicating liquors. S.J. Res. 211, 72d Cong., 2d Sess., 76 CONG. REC. 4143 (1933); *see also Georgia v. Wenger*, 94 F. Supp. 976, 982 (E.D. Ill. 1950)(purpose of twenty-first amendment was to grant states authority to enact policies concerning liquor without hindrance), *aff'd*, 187 F.2d 285 (7th Cir.), *cert. denied*, 342 U.S. 822 (1951).

⁴⁸ *See Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)(state had absolute power under twenty-first amendment to prescribe conditions of manufacturing, sale, and transportation of liquor); *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936)(twenty-first amendment granted states broad power to enact liquor importation regulations); *Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970)(twenty-first amendment granted states broad right to regulate liquor); *Boscia v. Warren*, 359 F. Supp. 900, 901 (E.D. Wis. 1973)(because of twenty-first amendment, state liquor regulations had strong presumption of validity); *Houser v. State*, 540 P.2d 412, 414 (Wash. 1975)(state liquor regulations subject to "rational relationship" standard of review). *See generally Comment, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1578-82 (1975)(examination of increased state authority over liquor).

⁴⁹ *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982)(states cannot use powers under twenty-first amendment to impinge upon Establishment Clause); *Craig v. Boren*, 429 U.S. 190, 209-10 (1976)(twenty-first amendment does not alter standard of

The Court first addressed the interaction of the first and twenty-first amendments⁵⁰ in a non-commercial speech case, *California v. LaRue*.⁵¹ In *LaRue*, the Court declined to limit the state's power under the twenty-first amendment in light of a first amendment challenge⁵² and upheld a state regulation that prohibited certain types of sexual entertainment in businesses licensed to sell liquor.⁵³ The Court, while recognizing that some of the entertainment was protected under first amendment guarantees of freedom of expression,⁵⁴ stated that the crit-

review for equal protection clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(liquor regulation must meet traditional procedural due process standards).

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court, applying an intermediate level of review for gender-based classifications, held that an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and to females under 18 violated the equal protection clause. *Id.* at 192. The Court stated that "[n]either the text nor the history of the twenty-first amendment suggests that it qualifies individual rights protected by the Bill of Rights and the fourteenth amendment where the sale or use of liquor is concerned." *Id.* at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).

⁵⁰ The Supreme Court has directly addressed the effect of the twenty-first amendment on forms of expression protected by the first amendment in only two cases, *California v. LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). In *Bellanca* the owners of nightclubs, bars, and restaurants which offered topless dancing entertainment challenged on first amendment grounds a state statute prohibiting nude dancing in establishments licensed to sell liquor for on-premises consumption. *Bellanca*, 452 U.S. at 714-15. The Court, in upholding the statute, noted that the state's power under the twenty-first amendment to entirely ban the sale of liquor within its boundaries included the lesser power to ban the sale of liquor on premises where nude dancing occurred. *Id.* at 714. The Court held that while topless dancing might be entitled to some first amendment protection, the presumption of validity conferred by the twenty-first amendment on such regulations allowed the state to place reasonable restrictions on establishments licensed to sell liquor. *Id.* at 718.

⁵¹ 409 U.S. 109 (1972).

⁵² See *id.* at 114, 118-19.

⁵³ *Id.* at 118-19. The regulation was challenged by holders of various liquor licenses and dancers at the businesses operated by the licensees. *Id.* at 110.

⁵⁴ *Id.* at 118. In pointing out that some of the entertainment was constitutionally protected, the Court referred to *Roth v. United States*, 354 U.S. 476 (1957), and *United States v. O'Brien*, 391 U.S. 367 (1968). *LaRue*, 409 U.S. at 116-18. In *Roth*, the Court defined obscenity as that "which deals with sex in a manner appealing to the prurient interest," *Roth*, 354 U.S. at 487, and held that obscenity was not protected first amendment speech. *Id.* at 485. The *LaRue* Court concluded, however, that under *Roth* and its progeny some of the proscribed entertainment could not be considered obscene. *LaRue*, 409 U.S. at 116.

In *O'Brien*, the Court stated that when "'speech'" and "'nonspeech'" elements were present in a course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations of First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The Court in *LaRue* cited *O'Brien* as suggesting

ical factor was that the state had not attempted to prohibit the entertainment "across the board."⁵⁵ Because the state only prohibited the expression in establishments licensed to sell liquor,⁵⁶ the Court viewed the regulations as restrictions on the availability of liquor that only incidentally affected first amendment rights.⁵⁷ Reasoning that the twenty-first amendment confers "something more than the normal state authority over public health, welfare, and morals,"⁵⁸ and that regulations enacted pursuant to the twenty-first amendment have a presumption of validity,⁵⁹ the Court applied a deferential standard of review in upholding the state regulations.⁶⁰

The Ohio Supreme Court considered the effect of the twenty-first amendment on commercial speech rights in *Queensgate Investment*

that the extent to which the first amendment protected conduct depended upon the presence of a "'communicative element.'" *LaRue*, 409 U.S. at 117 (citing *O'Brien*, 391 U.S. at 376). The Court stated that the regulations restricted entertainment consisting "more of gross sexuality than of communication," *LaRue*, 409 U.S. at 118, and did not further analyze the regulations under the balancing test enunciated in *O'Brien*. See *id.* at 116-18.

For an extensive discussion of *LaRue* and the Court's treatment of *O'Brien*, see Note, California v. LaRue: *The Supreme Court's View of Wine, Women, and the First Amendment*, 68 Nw. U.L. REV. 130, 135-38, 142-60 (1973).

⁵⁵ *LaRue*, 409 U.S. at 118. In *Doran v. Salem Inn*, 422 U.S. 922 (1975) the Court emphasized the importance of not banning the protected expression entirely and held that a district court had not abused its discretion by enjoining the enforcement of a municipal ordinance that not only banned topless dancing in bars, but also prohibited the appearance of topless females in any public place. *Id.* at 932-34. The Court noted that if the prohibition had been limited to places serving alcohol, as in *LaRue*, the protected expression could have been banned under the authority of the twenty-first amendment. *Id.* at 932-33.

⁵⁶ *LaRue*, 409 U.S. at 110.

⁵⁷ See *id.* at 114-16, 118-19. The Court stated that the challenged regulations did not arise "in the context of censoring a dramatic performance in a theater," but in the context of prohibiting types of entertainment performed in bars and nightclubs licensed to sell liquor. *Id.* at 115.

⁵⁸ *Id.* at 114.

⁵⁹ *Id.* at 118. Ordinarily, the burden of proof is on the party seeking to uphold the restriction on commercial speech. *Bolger v. Youngs Drug Prod. Corp.*, 103 S. Ct. 2875, 2882 n.20 (1983).

⁶⁰ See *id.* at 118-19. The Court held:

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an *irrational* one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

Id. (emphasis added)(footnote omitted).

Co. v. Liquor Control Commission.⁶¹ In *Queensgate*, a liquor permit holder⁶² challenged on first amendment grounds a state regulation which prohibited certain permit holders from advertising liquor prices outside their premises.⁶³ The Ohio Supreme Court held that the regulation did not violate the first amendment⁶⁴ and that it passed the *Central Hudson* four-part test for determining the validity of commercial speech regulations.⁶⁵

In applying the test, the court first found that the commercial speech in question concerned a lawful activity, the sale of alcohol by a permit holder, and that the speech was not misleading.⁶⁶ The court, noting the state's power under the twenty-first amendment to regulate liquor, next recognized that the asserted government interest in minimizing the evils of alcohol by discouraging excessive alcohol consumption was substantial.⁶⁷ Focusing on the final two components of the *Central Hudson* test, the court stated that the regulation directly advanced the government's interest⁶⁸ and that a less extensive regulation would not have sufficed to serve that interest.⁶⁹ The United States Su-

⁶¹ 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982).

⁶² 433 N.E.2d at 139. *Queensgate* Investment Company, owner and operator of a motel and discotheque, advertised drinks at special prices in an edition of its monthly newsletter, which was distributed on the premises and mailed to club members. The Ohio Liquor Control Commission found that the advertising violated the off-premises advertising regulations of the Commission and imposed a seven-day suspension of *Queensgate's* Liquor license. *Id.*

⁶³ *Id.* at 141. The regulation provided that holders of certain liquor licenses could advertise the price per bottle or per drink of any alcoholic beverage only within their premises and in a manner not visible from outside the premises. *Id.* at 139 n.1 (quoting OHIO ADMIN. CODE § 4301:1-1-44(A)(1977)). The licensees were allowed to advertise in the media and could include the retail price of the original container in such advertising, but the advertisements could not refer to price advantage. *Queensgate*, 433 N.E.2d at 139 n.1 (citing OHIO ADMIN. CODE § 4301:1-1-44(B)(1977)).

⁶⁴ *Queensgate*, 433 N.E.2d at 141.

⁶⁵ *Id.* at 141-42; see *supra* notes 37-44 and accompanying text.

⁶⁶ *Queensgate*, 433 N.E.2d at 141.

⁶⁷ *Id.* The court noted that the state's power under the twenty-first amendment to absolutely prohibit the sale of alcohol within its borders included the lesser power to regulate the manufacture, sale, transportation, and possession of liquor where those regulations were reasonable and served the policy of confining the traffic of liquor in order to minimize the evils of excessive consumption. *Id.* at 141-42 (citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939)).

⁶⁸ *Queensgate*, 433 N.E.2d at 142. The court stated that since the regulation focused on the restriction of alcohol rather than on the restriction of speech, the regulation directly advanced the governmental interest. *Id.*

⁶⁹ *Id.* The court noted that the advertising of drink prices and price advantage encouraged excessive consumption of alcoholic beverages; therefore, the advertising prohi-

preme Court later dismissed an appeal of the Ohio Supreme Court's decision for want of a substantial federal question,⁷⁰ thereby upholding the Ohio liquor advertising regulation.⁷¹

In *Oklahoma Telecasters Association v. Crisp*,⁷² the United States Court of Appeals for the Tenth Circuit relied on the summary disposition of *Queensgate*⁷³ and held that state regulations⁷⁴ banning the

bition aided in curtailing liquor consumption. A less extensive regulation would not have achieved the same purpose. *Id.*

⁷⁰ 459 U.S. 807, 807 (1982).

⁷¹ See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)(per curiam)(summary dismissal upholds judgment of lower court but is not affirmance of lower court's opinion).

⁷² 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom.* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984). *Crisp* was a consolidated appeal of two summary judgments which declared that Oklahoma's prohibitions on liquor advertising violated the first and fourteenth amendments. Telecasters (an association of corporations and partnerships engaged in television broadcasting in Oklahoma) and the cable operators (holders of cable television franchises within the state) brought suit against Crisp, the former director of the agency responsible for enforcing Oklahoma's liquor regulatory laws, challenging the constitutionality of the advertising regulations. *Crisp*, 699 F.2d at 492.

⁷³ *Crisp*, 699 F.2d at 497. The *Crisp* court determined the precedential effect of the Supreme Court's summary dismissal in *Queensgate* by examining *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). *Crisp*, 699 F.2d at 495-96. In *Hicks*, the Supreme Court held that since the Court's appellate jurisdiction under 28 U.S.C. § 1257(2)(1982) was mandatory, the Court was required to consider the merits of a case brought before the Court on appeal. Consequently, the Court in *Hicks* ruled that a summary dismissal of an appeal for want of a substantial federal question is a decision on the merits of a case and such a decision is binding on the lower federal courts. *Hicks*, 422 U.S. at 344-45.

Next, the *Crisp* court analyzed the Supreme Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), which held that summary dismissals should not be read as breaking new ground but were binding on lower courts as to the precise issues presented and necessarily decided by those actions. *Crisp*, 699 F.2d at 496.

Finally, the *Crisp* court, in holding that summary dismissal of *Queensgate* was binding in the instant case, considered the Supreme Court's warning in *Mandel* that courts should conduct an independent examination of the merits of a case. *Crisp*, 699 F.2d at 497 (citing *Mandel*, 432 U.S. at 177). Taking heed of that warning, the *Crisp* court decided that *Queensgate* would only "caution" the court against finding the state regulations unconstitutional. *Crisp*, 699 F.2d at 497.

⁷⁴ OKLA. CONST. art. XXVII, § 5, and OKLA. STAT. ANN. tit. 37, § 516 (West Supp. 1983), prohibit the advertising of wine and other alcoholic beverages except by strictly regulated on-premises signs. OKLA. STAT. ANN. tit. 37, § 506(3)(West Supp. 1983), defines "beer" as any beverage with more than 3.2% alcohol. Since beer can contain 3.2% alcohol or less, its advertisement was generally allowed. *Crisp*, 699 F.2d at 492. The advertising ban required Telecasters to "block out" network advertising of wine which originated in other states or to be subject to criminal sanctions imposed by complaint of the Alcoholic Beverage Control Board. Cable operators were also prohibited from relaying out-of-state liquor advertisements, despite Federal Communications Commission regulations and federal copyright laws prohibiting them from altering the television signals relayed

broadcasting of liquor advertisements did not violate first amendment commercial speech rights.⁷⁵ The *Crisp* court stated that the regulations against liquor advertising were an exercise of the authority granted the states by the twenty-first amendment⁷⁶ and were entitled to the added presumption of validity in favor of those restrictions.⁷⁷ Noting that the twenty-first amendment did not grant states the authority to abrogate individual constitutional rights,⁷⁸ the court applied the *Central Hudson* test⁷⁹ and determined that the advertising ban did not violate the "limited measure of protection" afforded commercial speech.⁸⁰ The court held that the advertising was not misleading and that the sale and consumption of alcohol, though heavily regulated, was a lawful activity. Therefore, the commercial speech met the first part of the *Central Hudson* test and was afforded first amendment protection.⁸¹ Moreover, the court held that Oklahoma's interest in promoting temperance was not only substantial, but exceptionally strong due to the additional power conferred by the twenty-first amendment.⁸² The court further held that as a matter of law the advertising ban was "reasonably related" to the state's interest in reducing alcohol consumption, despite the lack of empirical evidence to that effect.⁸³ Lastly, the court stated

to subscribers. *Id.*

⁷⁵ *Crisp*, 699 F.2d at 498.

⁷⁶ *Id.* The court grounded this statement on the fact that the purpose of liquor advertising was "unquestionably" to encourage liquor sales, a purpose obviously incident to the sale of liquor; therefore, the state could regulate the advertising of liquor. Also, the court, citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939), stated alternatively that the regulations were justified as a method selected by the state to achieve the proper goal of protecting the citizens of the state from the harms incident to alcohol consumption. *Crisp*, 699 F.2d at 498.

⁷⁷ *Crisp*, 699 F.2d at 498 (citing *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981)).

⁷⁸ *Crisp*, 699 F.2d at 498.

⁷⁹ See *supra* notes 37-44 and accompanying text.

⁸⁰ *Crisp*, 699 F.2d at 499; see also *supra* notes 25-32 and accompanying text.

⁸¹ *Crisp*, 699 F.2d at 500.

⁸² *Id.*

⁸³ *Id.* at 501. The court stated that because of the deference owed to the legislature as a result of the twenty-first amendment and the language of the Supreme Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-09 (1980), evidence that the ban directly advanced the state's interest was not required so long as such a finding was not unreasonable. *Crisp*, 699 F.2d at 501. In *Metromedia* the Supreme Court upheld, insofar as it pertained to commercial speech, an ordinance imposing substantial prohibitions on billboard advertising within the city. In applying the *Central Hudson* test to the ordinance, the Court held that the speech was protected, that the city's interests in traffic safety and in improving the appearance of the city were substantial and that the ordinance was no broader than necessary to protect those interests. *Metromedia*, 453 U.S. at

that the regulations were no more extensive than necessary to serve the state's interest.⁸⁴ In holding that the state regulations were constitutional, the court emphasized that *Central Hudson* was essentially a balancing test. When the twenty-first amendment was considered in addition to the state's substantial interest under its police powers, the balance shifted in the state's favor, permitting commercial speech regulations that might not otherwise be permissible.⁸⁵

On appeal, the United States Supreme Court, after the Fifth Circuit's decision in the instant case, reversed *Crisp* on federal preemption grounds without reaching the first amendment question.⁸⁶

In the instant case, the Fifth Circuit held that Mississippi's advertising ban was constitutional.⁸⁷ The court recognized that earlier decisions involving first amendment challenges to state actions under the twenty-first amendment had been characterized by an unusual degree of deference.⁸⁸ The court also pointed out that since the twenty-first amendment was the only express grant of power to the states through

507-08. While noting the meager record on the question of whether the billboard ban directly advanced the state's interest, the Court stated that it was hesitant to disagree with the "common-sense judgments" of lawmakers who determined that billboards were hazards to traffic safety. Since there was nothing to suggest that the judgments were "unreasonable," the Court held that the ban directly advanced the state's interest. *Id.* at 508-10. For a discussion of the standard of review used in *Metromedia*, see Comment, *Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego*, 66 MINN. L. REV. 903 (1982).

⁸⁴ *Crisp*, 699 F.2d at 502.

⁸⁵ *Id.*

⁸⁶ *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2709 n.16 (1984). In a unanimous decision, the Supreme Court held that application of Oklahoma's liquor advertising ban to out-of-state signals carried by cable operators in the state was preempted by the Federal Communications Commission regulations governing cable signal carriage. *Id.* at 2703.

In rejecting the claim that the twenty-first amendment saved the ban from preemption, the Court noted that the state's selective approach toward the regulation of liquor advertising suggested limits on the substantiality of the state's interest in promoting temperance. Comparing the state and federal interests, the Court held that the state's limited interest was clearly not of the same stature as the federal objective of ensuring the availability of diverse cable services. The Court further noted that, in contrast to state regulations governing the importation and sale of liquor within the state, the application of Oklahoma's advertising ban to the importation of signals by cable television operators only indirectly engaged the state's powers under the twenty-first amendment. Since the state's central power under the amendment was not directly implicated, the Court held that the balance between state and federal power tipped in favor of the federal law and that the enforcement of the state ban was barred by the Supremacy Clause. *Id.* at 2709.

⁸⁷ *Dunagin*, 718 F.2d at 753.

⁸⁸ *Id.* at 744-46; see *supra* notes 50, 56-60, 66-69, 81-85 and accompanying text.

the constitutional scheme, analysis of a state liquor regulation did not proceed by the traditional route for testing state statutes, but rather from a vantage point of presumed state power.⁸⁹

Applying the *Central Hudson* test, the court reasoned that since liquor advertising was neither misleading nor intended to promote any illegal activity,⁹⁰ it was protected by the first amendment.⁹¹ Moreover, since the state asserted a substantial interest in "safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor," the second part of the *Central Hudson* test was also satisfied.⁹² Despite a lack of "concrete scientific evidence" linking advertising to increased consumption, the court held that since sufficient reason existed to believe that advertising increased consumption, the advertising ban directly advanced the state's interest.⁹³ Therefore, the third requirement of the *Central Hudson* test was also satisfied. Finally, the court held that since the twenty-first amendment granted the state a "wide latitude as to choice of means," the absolute intra-state ban was not more extensive than necessary to serve the state's interest.⁹⁴

⁸⁹ *Dunagin*, 718 F.2d at 744 (quoting *Castlewood Int'l Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 949, *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980)).

⁹⁰ *Dunagin*, 718 F.2d at 742-43.

⁹¹ *Id.* at 747.

⁹² *Id.*

⁹³ *Id.* at 750. In determining that the ban directly advanced the state's interest, the court noted that the legislative decision that advertising increased consumption, if not binding, was at least entitled to great weight. *Id.* at 748 n.8. The court further noted that whether it characterized its decision as following the judicial notice approach taken in *Central Hudson* or the "common-sense judgment" approach taken in *Metromedia*, it simply did not believe that the liquor industry would spend a billion dollars a year on advertising if it did not increase consumption. See *supra* note 83 for a discussion of the approach taken by *Metromedia*. For a discussion as to why the courts in *Dunagin* and *Crisp* should not have relied on *Metromedia*, see Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty-First Amendments*, 59 N.Y.U. L. REV. 157, 163-64, 178-79 (1984).

Concluding that the ban was sufficiently justified to pass constitutional muster, the *Dunagin* court added that, if balancing was necessary, the added presumption of validity required by *LaRue*, *Bellanca* and *Queensgate* helped to establish the balance in favor of the state. *Dunagin*, 718 F.2d at 750; see *supra* note 50 and text accompanying note 59.

⁹⁴ *Dunagin*, 718 F.2d at 751 (quoting *LaRue*, 409 U.S. at 116). The Court noted that it was required to apply the fourth part of the *Central Hudson* test in light of *LaRue*, *Bellanca* and *Queensgate*. In determining that a less restrictive regulation would not be effective, the court also relied on the plurality's opinion in *Metromedia*. *Dunagin*, 718 F.2d at 751. But see Note, *supra* note 93, at 176-82 (*Dunagin* court erred in relying on

In his dissent, Judge Gee⁹⁵ maintained that since the advertising ban was directed at the suppression of speech rather than the dispensation of liquor,⁹⁶ and since the Mississippi laws impose a virtually absolute ban upon this expression,⁹⁷ the deferential approach used in *LaRue*⁹⁸ was not applicable.⁹⁹ He noted that since the twenty-first amendment's grant of state regulatory power over liquor itself cannot be read to grant similarly broad power over other constitutional guarantees merely because liquor is involved, restrictions on liquor advertising must adhere to the customary commercial speech standard requiring that such regulations directly advance a substantial government interest.¹⁰⁰ He concluded that since the state had failed to introduce evidence showing that the intrastate ban had any effect on liquor consumption, particularly in view of Mississippi's saturation with such advertising from outside the state, the ban did not directly advance the state's interest and, therefore, violated the first amendment.¹⁰¹

In reviewing the applicable law, it appears that the *Dunagin* court erred in using the twenty-first amendment to dilute the level of scru-

LaRue, Bellanca, Queensgate and Metromedia).

⁹⁵ Circuit Judge Gee, joined by Circuit Judges Goldberg, Politz, Randall and Higginbotham, dissented for the reasons expressed in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, *rev'd sub nom. Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983). *Dunagin*, 718 F.2d at 755 (Gee, J., dissenting). Circuit Judge Higginbotham also filed an opinion concurring in the dissent. *Id.* at 755.

⁹⁶ *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 328 *rev'd sub nom. Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983).

⁹⁷ *Id.* The *Lamar* court had argued that the critical fact for the Supreme Court's decision in *LaRue* was that the state had not banned the expression across the board. *Id.* at 327 (citing *California v. LaRue*, 409 U.S. 109, 118 (1972)). The court noted that, unlike the restrictions in *LaRue*, the Mississippi regulations did not affect expression only incidentally, but rather banned the speech directly and entirely. *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 328 *rev'd sub nom. Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983). The *Lamar* court also noted that the *LaRue* Court's use of a deferential standard of review was based not only on the twenty-first amendment, but also on a state's additional power to regulate expression that is also conduct. *Id.* at 327.

⁹⁸ See *supra* notes 51-60 and accompanying text.

⁹⁹ *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 327-28 *rev'd sub nom. Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983).

¹⁰⁰ *Id.* at 330.

¹⁰¹ *Id.* at 333. See generally Note, *Mississippi's Prohibition of Alcoholic Beverage Advertising: A Constitutional Analysis*, 5 COMM/ENT L.J. 127, 127-45 (1982)(discussing Mississippi's liquor advertising ban as violating first amendment commercial speech rights).

tiny required for commercial speech restrictions.¹⁰² Neither the text nor the history of the twenty-first amendment justifies the dilution.¹⁰³ Furthermore, *LaRue*,¹⁰⁴ *Bellanca*,¹⁰⁵ and *Queensgate*,¹⁰⁶ all distinguishable from the instant case, do not justify the dilution, and the Fifth Circuit should not have viewed them as altering the customary commercial speech standard of review.¹⁰⁷ By doing so, the court ignored the significant line of Supreme Court cases which hold that the twenty-first amendment does not alter the customary standard of review of state laws which allegedly abridge rights secured by the Bill of Rights and the fourteenth amendment.¹⁰⁸ Under these Supreme Court cases the applicable standard of review was that enunciated in *Central Hudson*, undiminished by any twenty-first amendment implications.¹⁰⁹ If the Fifth Circuit had strictly adhered to the *Central Hudson* standard of review, it is doubtful that Mississippi's advertising ban would have withstood the first amendment challenge.¹¹⁰

However faulty one may find the *Dunagin* court's legal analysis, the effect of its decision is clear. The *Dunagin* opinion together with the Tenth Circuit's decision in *Crisp*¹¹¹ and the Supreme Court's refusal to directly address the issue,¹¹² will probably act as a substantial deterrent to subsequent suits challenging state liquor advertising re-

¹⁰² See *supra* notes 93-94.

¹⁰³ See *supra* notes 47, 49.

¹⁰⁴ See *supra* notes 51-60 and accompanying text.

¹⁰⁵ See *supra* note 50.

¹⁰⁶ See *supra* notes 61-71 and accompanying text.

¹⁰⁷ See *supra* notes 93-94. Both *LaRue* and *Bellanca* contained factors not present in *Dunagin* which made application of a deferential standard of review proper. In both *LaRue* and *Bellanca*, the challenged restrictions were directly aimed at regulating the availability of alcohol, not at suppressing speech, as were the regulations in the instant case. Neither case involved an absolute ban on protected expression, as did the instant case. Further, both cases involved expression which contained an element of conduct — a factor not present in the case at bar. See *supra* notes 49-60, 96-97 and accompanying text. It is also difficult to read *Queensgate*, a summary dismissal which may not be viewed as "breaking new ground," as altering the customary commercial speech standard of review. The regulation in *Queensgate* merely prohibited retail liquor dealers from advertising liquor prices, hardly the "precise issue" presented when a state prohibits advertisers from disseminating any advertisements concerning liquor. See *supra* notes 63, 73.

¹⁰⁸ See *supra* note 49 and accompanying text.

¹⁰⁹ See *supra* text accompanying notes 39-44 for the *Central Hudson* test.

¹¹⁰ See Note, *supra* note 93, at 186-89 (complete prohibition of liquor advertising unconstitutional under *Central Hudson*); Note, *supra* note 101, at 131-49 (Mississippi's liquor advertising ban unconstitutional under *Central Hudson*).

¹¹¹ See *supra* notes 72-85 and accompanying text.

¹¹² See *Dunagin*, 104 S. Ct. 3553 (1984)(denial of certiorari); *supra* notes 70, 86 and accompanying text.

strictions on first amendment commercial speech grounds. For all practical purposes, then, the conflict between the twenty-first amendment and commercial speech may have been resolved, the result being that the twenty-first amendment now overrides the first amendment protection afforded commercial speech.

Unfortunately this "resolution" does more than uphold the constitutionality of state liquor advertising bans; it also reads into the twenty-first amendment implications which justify intrusions upon personal liberties that neither its framers nor precedent ever intended it to have.

Cynthia C. Etheridge



CRIMINAL PROCEDURE — SEARCH AND SEIZURE — INTERCEPTION OF
CORDLESS TELEPHONE COMMUNICATION DOES NOT VIOLATE TITLE III
OF OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Defendants,¹ who were being tried in the Reno District Court of Kansas for possession and conspiracy to sell narcotics,² moved to suppress tape recordings of incriminating conversations³ which they had made through the use of a cordless telephone.⁴ The recordings were made by a third party⁵ who had intercepted the defendants' conversations through an ordinary AM/FM radio.⁶ The district court granted the defendants' motion to suppress, holding that the warrantless recording of the defendants' conversations⁷ violated Title III of the Om-

¹ The defendants were Timothy Ray Howard and Rosemarie Howard. *State v. Howard*, 235 Kan. 236, 679 P.2d 197, 198 (1984).

² The defendants had been charged with possession of cocaine and conspiracy to sell marijuana under KAN. STAT. ANN. §§ 21-3302, 65-4127a, 65-4127b (1980 & Supp. 1982). *Howard*, 679 P.2d at 198.

³ *Howard*, 679 P.2d at 198. Acting on information revealed by the recorded conversations and on surveillance of the defendants' actions, the state procured a search warrant for the home of the defendants. A search of the dwelling resulted in the seizure of illegal narcotics and a cordless telephone. *Id.* at 198-99.

⁴ *Id.* at 198. The cordless telephone consisted of a base component and a mobile transceiver, which were not connected by wire or any other tangible material. An employee of the Radio Shack Corporation, manufacturer of the cordless telephone, testified as to the structure and functions of the device and stated that an ordinary buyer would know from the owner's manual that the cordless telephone operated by transmitting and receiving standard FM radio signals. He further specified that the range of the telephone could fluctuate between 30 and 100 feet, depending upon a number of variables, including local weather conditions. *Id.* at 199.

⁵ *Id.* at 198. The third party, designated in the record as a confidential informant, was a neighbor of the defendants. *Id.*

⁶ *Id.* The informant's radio was kept inside his home for ordinary purposes and was initially used without the knowledge of law enforcement officers. The informant gave tape-recordings of the defendants' conversations to local police, who forwarded the recordings to the Kansas Bureau of Investigation. The Bureau supplied the informant with a tape recorder and several blank tapes, requesting that he record any of the defendants' conversations which he might receive over his radio in the future and that he keep a record of the times of the conversations. *Id.*

⁷ *Id.* Although the Kansas Bureau of Investigation had not obtained a court order for the recording of the defendants' conversations, it did obtain court authorization to attach a pen register to the defendants' telephone. The pen register was a device which had the limited function of duplicating the numbers dialed on a telephone. Records from the pen register were used to corroborate the times of the conversations recorded by the informant. *Id.*

nibus Crime Control and Safe Streets Act of 1968.⁸ On interlocutory appeal,⁹ the Kansas Supreme Court, *held*, reversed and remanded. Cordless telephone conversations afford no reasonable expectation of privacy, and the interception and recording of such conversations does not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *State v. Howard*, 235 Kan. 236, 679 P.2d 197 (1984).

The common-law rule that all evidence, whether legally or illegally acquired, was admissible at trial¹⁰ was first questioned by the United States Supreme Court in 1886 in *Boyd v. United States*.¹¹ *Boyd* gave credence to the theory that the fourth amendment¹² could be used to exclude illegally seized evidence from consideration at trial.¹³ Twenty-eight years after *Boyd*, the Supreme Court established the exclusionary rule¹⁴ as a remedy for the victims of searches and seizures conducted in

⁸ *Id.* at 200. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982) [hereinafter cited as Title III], was intended to protect the privacy interest that one has in certain oral and wire communications. Title III was also intended to serve as a guideline, detailing the conditions and circumstances requisite for the proper interception of conversations in which one has a protected privacy interest. *Howard*, 679 P.2d at 201.

⁹ *Howard*, 679 P.2d at 198; see KAN. STAT. ANN. § 22-3603 (1981)(discussion of when appeal may be taken from trial judge's decision to suppress evidence).

¹⁰ 4 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 626 (1923); see, e.g., *Legatt v. Tollervey*, 14 East 302, 104 Eng. Rep. 617, 619 (K.B. 1811)(evidence was admissible even though surreptitiously obtained).

¹¹ 116 U.S. 616 (1886).

¹² The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The purpose of the fourth amendment was to limit the government's power to search one's person, house, papers or effects and to stop the seizure of property against one's will. *Olmstead v. United States*, 277 U.S. 438, 463 (1928).

¹³ *Boyd*, 116 U.S. at 630. The suggestion that illegally seized evidence should be excluded was made by Justice Bradley and was not well received by some state courts and commentators. 4 J. WIGMORE, *supra* note 10, § 2184, at 632; see *Adams v. New York*, 192 U.S. 585, 597-98 (1904)(distinguished *Boyd* and held that admission of illegally obtained evidence did not violate the fourth amendment).

¹⁴ The Supreme Court established the exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 393 (1914). Under the exclusionary rule, evidence that has been acquired by unconstitutional means may not be admitted at trial. The purpose of the rule is to safeguard the fourth, fifth and sixth amendments and to discourage police or other government officials from obtaining evidence illegally. C. WHITEBREAD, CRIMINAL PROCEDURE,

violation of the Constitution.¹⁵ The Court's exclusionary rule required trial courts to suppress evidence that was obtained in violation of an individual's fourth amendment rights.¹⁶

The effect of the exclusionary rule on evidence obtained by electronic surveillance was first considered in *Olmstead v. United States*.¹⁷ In *Olmstead*, a closely divided Court¹⁸ found that the tapping of the defendants' telephones by federal officers was not a search or a seizure within the purview of the fourth amendment¹⁹ since there was neither a search nor a seizure of tangible objects, nor a physical trespass on property owned or controlled by the defendants.²⁰ By limiting fourth

AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 14, 53 (1980).

In *Weeks*, the Court found that evidence seized by a federal officer without a warrant violated the fourth amendment and was inadmissible in a criminal trial. *Weeks*, 232 U.S. at 393, 398.

The *Weeks* exclusionary rule was only applied to federal proceedings and was not applied to state proceedings until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). See *Ker v. California*, 374 U.S. 23, 30-34 (1963)(Supreme Court analyzed effect of applying exclusionary rule to states through *Mapp*). See generally Comment, *Erosion of the Exclusionary Rule*, 22 SANTA CLARA L. REV. 1027, 1030-31, 1034-35 (1982)(discussion of history of exclusionary rule).

¹⁵ Survey, *Criminal Law in the Ninth Circuit: Recent Developments*, 13 LOY. L.A.L. REV. 591, 712 (1980). Even though the fourth amendment established that one's right to be safe from unreasonable searches and seizures should not be infringed, neither the amendment nor any other part of the Constitution furnished a remedy if this right was violated. *Id.*

¹⁶ See *United States v. Calandra*, 414 U.S. 338, 347 (1974)(purpose of the exclusionary rule is to guarantee fourth amendment rights and deter illegal police conduct).

¹⁷ 277 U.S. 438 (1928).

¹⁸ The *Olmstead* Court was divided five to four with the majority of the Court favoring a narrow interpretation of the Constitution and the minority of the Court favoring a more liberal view. Scholars have theorized that the two opposing schools of thought were responsible for producing an inconsistent constitutional policy. Comment, *Some Conflicting Decisions of the United States Supreme Court*, 13 VA. L. REV. 278, 294 (1927).

¹⁹ *Olmstead*, 277 U.S. at 466, 468. With the declaration that unethically but constitutionally obtained evidence had never been subject to exclusion by a court, the *Olmstead* Court emphasized that setting such a rule would cause the nation to suffer by affording criminals more privileges than they already possessed. *Id.* at 468.

²⁰ *Id.* at 464. The Court stressed that the fourth amendment mandated the decision that no violation of the Constitution had occurred because the amendment mentioned only material objects such as persons, houses, papers and effects. Emphasis was also placed on the fact that no actual entry had been made into the defendants' homes or offices. Dissenting, Justice Brandeis declared that the right to privacy was a fundamental right under the Constitution and that invasion of one's privacy by the government, however effected, was a violation of fourth amendment protections. Justice Brandeis further stated that wiretapping was a violation of the fourth amendment, and, therefore, any evidence acquired through wiretapping should have been excluded. *Id.* at 478-79. See

amendment violations to searches and seizures of tangible objects and to physical trespasses on a defendant's property, *Olmstead* created what became known as the Trespass Doctrine.²¹ Under the Trespass Doctrine, actual trespass was a prerequisite to any finding of an illegal search or seizure.²²

In addition to announcing the Trespass Doctrine, the *Olmstead* court pointed out that only Congress had the power, through legislative enactments, to exclude evidence of intercepted telephone conversations from the trier of fact in a federal criminal proceeding.²³ Congress responded by passing the Federal Communications Act of 1934.²⁴ For the next three decades the Federal Communications Act and the Trespass Doctrine were the controlling laws for issues pertaining to electronic surveillance.²⁵ During this period, however, the *Olmstead* requirement

generally J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* 6 (1977)(discussion of Brandeis' dissent).

²¹ See C. WHITEBREAD, *supra* note 14, at 237 (discussion of the Trespass Doctrine); J. CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 310-11 (3d ed. 1980)(same).

²² *Olmstead*, 277 U.S. at 464-65. In *Olmstead*, the Court noted that since the federal agents had obtained the incriminating evidence by hearing only, no actual trespass had occurred. *Id.* The language of the fourth amendment was not extended to include telephone wires as part of one's dwelling or office. *Id.* at 465; see 1 W. LAFAYE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT* 271 (1978)(discussion of *Olmstead* holding that telephone conversations were not protected by fourth amendment).

²³ *Olmstead*, 277 U.S. at 465-66.

²⁴ Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064, 1103-04 (codified as amended at 47 U.S.C. § 605 (1982)). The Act states that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ." *Id.*, 48 Stat. at 1104. The Supreme Court interpreted the Act in *Nardone v. United States*, 308 U.S. 338 (1939), and held that direct and indirect evidence obtained through a wiretap by federal officials could not be divulged before a federal court. *Id.* at 338-43; see 2 C. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* 343 (12th ed. 1974)(*Nardone* made unauthorized interception and divulgence of private communications a federal crime). See generally J. CARR, *supra* note 20, at 7 (discussion of *Nardone*).

²⁵ J. CARR, *supra* note 20, at 6, 15. In *Goldman v. United States*, 316 U.S. 129, 134-35 (1942), the Supreme Court decided that a detectaphone put against the wall of an office in order to hear one side of a telephone conversation taking place in the next office was not a fourth amendment violation since no physical trespass occurred. The Court also held that there was no interception of a wire communication within the scope of the Federal Communications Act of 1934 because the word "intercept" required the seizure of something, and hearing a conversation through a wall did not constitute a seizure of the conversation. *Goldman*, 316 U.S. at 133-34.

The Court again employed the Trespass Doctrine in *On Lee v. United States*, 343 U.S. 747, 749 (1952). In *On Lee*, a wired federal undercover agent entered the defendant's place of business and engaged the defendant in an incriminating conversation. The conversation was transmitted to the radio receiver of another federal agent who was

of actual trespass as a prerequisite to an illegal search and seizure was modified in favor of the individual's interest in privacy.²⁶

Olmstead was continually modified until the Supreme Court expressly overruled it in the landmark decision of *Katz v. United States*.²⁷ In *Katz*, FBI agents, acting without a warrant, affixed an electronic listening and recording instrument to the exterior of a public telephone booth.²⁸ The agents used the device to hear defendant Katz's side of a conversation and thereby to obtain evidence of his suspected interstate gambling operation.²⁹

outside the building and who was subsequently permitted to testify in court as to what he had heard. *Id.* at 749-50. In rejecting the defendant's claim that his rights under the fourth amendment and the Federal Communications Act had been violated, the Court declared that the case did not deal with wiretapping or illegal eavesdropping because the radio transmitter revealed nothing that could not have otherwise been overheard by the agent outside. *Id.* at 751-54. The Court noted that the transmitter was inside the defendant's place of business only because the undercover agent had worn it inside and stressed the fact that there was no trespass since the agent had the defendant's permission to be in the building. The Court also noted that the overhearing of the conversation by the agent outside the premises did not constitute a trespass. Therefore, the Court found that since there had been no physical intrusion, there was no fourth amendment violation. *Id.*

²⁶ J. CARR, *supra* note 20, at 13. In *Silverman v. United States*, 365 U.S. 505 (1960), the Supreme Court held that a trespass did occur when federal agents inserted a microphone with a spike attached to it into the defendants' wall in order to hear the defendants' incriminating conversations. *Id.* at 506, 509, 512. The Court noted that since there was unauthorized physical penetration into the defendants' building, the federal officers had violated the defendants' fourth amendment rights, making the evidence obtained inadmissible. *Id.* at 511-12. In his majority opinion Justice Stewart noted the distinction between the detectaphone used in *Goldman v. United States*, 316 U.S. 129 (1942), where the evidence was admissible, and the spike mike employed in *Silverman*, where the evidence was excluded. *Silverman*, 365 U.S. at 508-11. The Court elaborated on the distinction by stating that "[the] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of law. It is based upon the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512; see *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (overhearing a verbal communication could constitute a seizure); see also 1 W. LAFAVE, *supra* note 22, at 272-73 (both *Silverman* and *Wong Sun* held that fourth amendment protected against eavesdropping on verbal statements). But see *Katz v. United States*, 389 U.S. 347, 365-67, 373-74 (1967) (Black, J., dissenting) (fourth amendment only protected material objects from being searched and seized without a warrant).

²⁷ 389 U.S. 347, 353 (1967).

²⁸ *Id.* at 348; see *Berger v. New York*, 388 U.S. 41, 59 (1967) (discussion of importance of obtaining a warrant for conducting electronic surveillance); 2 C. TORCIA, *supra* note 24, at 349-50 (warrant necessary for legal electronic surveillance).

²⁹ *Katz*, 389 U.S. at 348. The agents began electronic surveillance of the telephone booth only after they investigated the defendant and determined that he was using a particular telephone to communicate information for the purpose of gambling. *Id.* at 354.

Holding that no physical trespass was required for a violation of the fourth amendment, the Court excluded the evidence against Katz.³⁰ The Court declared that since "the Fourth Amendment protect[ed] people [and] not places," the issue of whether a telephone booth was a constitutionally protected area was not decisive in the case.³¹ If one attempted to keep his communication private, even in a publicly accessible place, he could be protected by the fourth amendment.³² The majority pointed out, however, that if one knew that he was revealing information to the public, the fourth amendment would not protect him.³³ The Court noted that the defendant was not trying to prevent being seen when he went inside the booth, but was trying to prevent being heard. It was the uninvited ear from which the defendant in *Katz* sought privacy. When the government purposely heard and recorded his telephone conversation, it violated the right to privacy on which he justifiably relied.³⁴

In his concurring opinion, Justice Harlan devised the current test for determining whether a reasonable expectation of privacy existed.³⁵ His interpretation of the majority opinion required that two standards be met.³⁶ First, one had to have an actual subjective expectation of privacy and, second, that expectation had to be reasonable.³⁷ Justice

Since the defendant was known to use the same telephone at the same time each day, the agents eavesdropped and recorded his conversations only during that time period. *Id.* at 354 & n.14.

³⁰ *Id.* at 353. The Court ruled that because no warrant was obtained, the fourth amendment was violated even if the agents acted with probable cause. *Id.* at 356.

³¹ *Id.* at 351. Although the Court never stated that it was abandoning the use of the concept of constitutionally protected areas, it did state that the concept could not be relied on to solve every fourth amendment problem. Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 80-81 (1974); see *infra* note 38.

³² *Katz*, 389 U.S. at 351.

³³ *Id.* at 352. The fact that the booth was available to the public at other times was immaterial. The important point was that the booth was temporarily private and afforded the user a reasonable expectation of privacy. *Id.* at 361 (Harlan, J., concurring).

³⁴ *Id.* at 352-53. The Court stated that when one closes the door of a telephone booth and pays his money, he takes for granted that what he says into the telephone mouthpiece will not be revealed to the public. The Court further stated that a more narrow interpretation of the Constitution would disregard the important role that the public telephone has come to play in private conversation. *Id.* at 352.

³⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

³⁶ *Id.* But cf. Note, *Expectation of Privacy Analysis and Warrantless Trash Searches after Katz v. United States*, 23 ARIZ. L. REV. 283, 287-88 (1981)(survey of lower courts' interpretation of *Katz* reveals seven factors in expectation of privacy analysis).

³⁷ *Katz*, 389 U.S. at 361; see Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 983 (1968)(no

Harlan emphasized that communications made in public were not usually protected since no reasonable expectation of privacy could be thought to exist in a public place.³⁸ Nevertheless, where a reasonable expectation of privacy did exist, electronic surveillance without a warrant could constitute a violation of the fourth amendment.³⁹

Implicit in *Katz* was the proposition that legislatures should address the constitutional problems of electronic surveillance by passing laws with sufficient protections.⁴⁰ Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁴¹ The

likelihood of intrusion required to justify expectation of privacy). Although the prevailing interpretation of *Katz* is that a subjective expectation of privacy is necessary to activate fourth amendment protections, some scholars have argued that such a requirement may not be reasonably derived from the case. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

³⁸ *Katz*, 389 U.S. at 361; see *State v. Lester*, 649 P.2d 346, 356 (Hawaii 1982)(Menor, J., concurring)(in deciding whether reasonable expectation of privacy existed, courts should consider location of the activity in question). Courts have found a reasonable expectation of privacy under various circumstances. See, e.g., *Berger v. New York*, 388 U.S. 41, 62-63 (1967)(law enforcement officers should respect reasonable expectation of privacy that exists in private home); *Stoner v. California*, 376 U.S. 483, 489-90 (1964)(defendant had reasonable expectation of privacy in his hotel room even though desk clerk consented to search); see also *supra* note 31. Compare *Texas v. Gonzales*, 388 F.2d 145, 148 (5th Cir. 1968)(search was unreasonable where policemen entered backyard of private home without probable cause for suspicion and peered through two windows before viewing criminal activity) with *Edwards v. State*, 38 Wis. 2d 332, 156 N.W.2d 397, 402 (1968)(search was reasonable where policemen viewed crime from public stairway through open apartment window). There is a general rule, however, for open fields. See *Oliver v. United States*, 104 S. Ct. 1735, 1741 (1984)(no reasonable expectation of privacy in open field even if locked gate and no trespassing sign are at entrance).

³⁹ See *Katz*, 389 U.S. at 354-59. In *Katz*, the Court attempted to balance effective law enforcement with the constitutional right to privacy. See Note, *Constitutional Criminal Procedure - Fourth Amendment - Search and Seizure - Electronic Surveillance - Pen Register*, 18 DUQ. L. REV. 735, 747 (1980)(underlying goal of *Katz* was to maximize individual freedom while simultaneously permitting authorities to use effective law enforcement tools) [hereinafter cited as Note, *Pen Register*]; Note, *The Reasonable Expectation of Privacy Katz v. United States, a Postscriptum*, 9 IND. L. REV. 468, 481 (1976)(*Katz* balanced individual freedoms against interests of law enforcement and took positive stand in favor of individual freedom).

⁴⁰ NATIONAL LAWYERS GUILD, RAISING AND LITIGATING ELECTRONICS SURVEILLANCE CLAIMS IN CRIMINAL CASES § 1.2, at 1-3 (1977).

⁴¹ 18 U.S.C. §§ 2510-2520 (1982). Congress believed that electronic surveillance procedures had been abused to such an extent that private conversations could be imperiled. S. REP. NO. 1097, 90th Cong., 2d Sess. 89 reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2156; see Comment, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch II*, 52 TEX. L. REV. 621, 655 (1974)(report of Senate Committee on Judiciary noted that tremendous scientific and technological developments led to widespread use and abuse of electronic surveillance

new Act divided communication into two types, "wire communication"⁴² and "oral communication,"⁴³ and forbade the willful, warrantless interception or disclosure of either type,⁴⁴ stipulating a penalty for

techniques).

Through Title III, Congress was trying to encourage better restraint of crime while safeguarding a citizen's right to private communication. See Erickson, *Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1978-1979*, 5 NAT'L J. CRIM. DEF. 1, 31 (1979) (President Carter stated that Title III was necessary for successful enforcement of law). Case law following the enactment of Title III reflected the congressional intent. See, e.g., *United States v. United States Dist. Court*, 407 U.S. 297, 302 (1972) (Title III was comprehensive attempt to control crime and protect privacy); *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971) (pre-conditions to wiretapping set forth in Title III must be enforced to realize congressional intent), *cert. denied sub. nom. United States v. Evans*, 408 U.S. 930 (1972); *United States v. Carroll*, 332 F. Supp. 1299, 1300 (D.D.C. 1971) (Title III was enacted to protect privacy interests threatened by electronic devices); see also C. WHITEBREAD, *supra* note 14, at 70 (Title III was passed to answer questions left open by *Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967)), NATIONAL LAWYER'S GUILD, *supra* note 40, § 1.2, at 1-3 (specific procedures to be employed in electronic surveillance were prescribed in Title III).

⁴² 18 U.S.C. § 2510(1)(1982). Title III defined "wire communication" as:

[A]ny communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

Id.

⁴³ 18 U.S.C. § 2510(2)(1982). Title III defined "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.*

⁴⁴ 18 U.S.C. § 2510(4)(1982). Title III defined "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." *Id.* The Act defined an "electronic, mechanical or other device" as "any device or apparatus which can be used to intercept a wire or oral communication," with the specific exception of telephones (and other equipment used by common carriers in the course of business), radios used by policemen in the normal course of duty, and hearing aids. *Id.* at (5)(a),(b); see C. FISHMAN, *WIRETAPPING AND EAVESDROPPING* 9 (1978) ("aural acquisition" is an unclear term).

Pen registers were not within the purview of the statute because they did not record the contents of conversations as required by the statutory definition of "intercept." A pen register can record only numbers dialed on a telephone and cannot record the spoken word. *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977); see *supra* note 7. Since *New York Tel. Co.*, courts have consistently held that pen registers do not violate Title III or the fourth amendment. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (use of pen register was not search within meaning of fourth amendment); *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 257 (9th Cir. 1977) (use of pen register did not violate fourth amendment or Title III). But cf. Note, *Pen Register*, *supra* note 39, at 747 (use of pen registers without a warrant undermined privacy interest promoted by *Katz* because public was unaware that pen registers could be placed on telephones).

violations.⁴⁶ Unless certain exceptions applied,⁴⁶ evidence obtained in violation of the Act was to be suppressed.⁴⁷

without judicial approval).

⁴⁶ 18 U.S.C. § 2511(1)(1982). The Act provided that violation of Title III would bring a maximum fine of \$10,000 or a maximum prison sentence of five years, or both. *Id.* These stringent penalties made violation of Title III a serious crime. *See Alderman v. United States*, 394 U.S. 165, 175 (1969)(amendments to Title III allowed recovery of punitive damages and attorney's fees).

⁴⁶ For the text of exceptions to Title III's exclusionary rule, see 18 U.S.C. § 2511(2)(1982). The most common exceptions were quality control monitoring by common carriers and consent by a party to the intercepted conversation. *C. WHITEBREAD, supra* note 14, at 246-47.

The Supreme Court has addressed the consensual interceptions exception to Title III. *See, e.g., United States v. White*, 401 U.S. 745, 751-54 (1971)(government agents did not violate fourth amendment or Title III when they recorded conversations transmitted by radio concealed on informant); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963)(agent did not violate fourth amendment when he simultaneously recorded conversation he was having with defendant); *On Lee v. United States*, 343 U.S. 747, 751-53 (1952)(undercover agent committed no trespass or fourth amendment violation when he entered defendant's business establishment and secretly recorded his conversation with defendant).

In *White*, the Court held that a defendant who lacked a reasonable expectation of privacy did not suffer a violation of his rights even if he was unaware that his conversation was being recorded. *White*, 401 U.S. at 752. The Court emphasized that even before the *Katz* decision, it was well established that the fourth amendment did not protect one's misplaced faith that a confidant whom one willingly told of his misconduct would not later disclose it. *Id.* at 750. Rather, a person involved in unlawful activities took the chance that his associates might reveal his involvement to authorities, and in taking that chance he also took the chance of instantaneous disclosure. *Id.*

Since *White*, federal courts have consistently held that consensual interception violates neither the fourth amendment nor Title III. *See, e.g., United States v. Shields*, 675 F.2d 1152, 1156-58 (11th Cir.)(consensual interception did not violate either Title III or the fourth amendment), *cert. denied*, 459 U.S. 858 (1982); *United States v. Diaz*, 535 F.2d 130, 133 (1st Cir. 1976)(*White* approved Title III consent provisions); *United States v. Santillo*, 507 F.2d 629, 632 (3d Cir.)(defendant consented when he confided in an informant), *cert. denied sub nom. United States v. Buchert*, 421 U.S. 968 (1975); *see also Hoffa v. United States*, 385 U.S. 293, 302 (1966)(conversation not protected by fourth amendment regardless of how much defendant trusted confidant and expected conversation to be secret); *United States v. Coven*, 662 F.2d 162, 173 (2d Cir. 1981)(for consent to be legal, it must be given by party to conversation but not necessarily party participating in actual communication so long as consenting party's presence is evident to those speaking).

The proposition that consensual interception does not violate an individual's rights was endorsed by the American Bar Association. 1 ABA STANDARDS FOR CRIMINAL JUSTICE 2-4.1, at 2.20-22 (Supp. 1982); *see C. FISHMAN, supra* note 44, at 16 (because consensual interception was not search or seizure, no warrant was needed to obtain information or to use such information at trial).

⁴⁷ 18 U.S.C. § 2515 (1982). The exclusionary rule of Title III was designed to deter

For an utterance to fall within the Title III definition of "oral communication," the declarant had to have a subjective expectation of privacy that was objectively reasonable.⁴⁸ Thus, an oral utterance made without a reasonable expectation of privacy was not affected by Title III.⁴⁹ Conversely, wire communications were protected without regard to whether there was an expectation of privacy.⁵⁰

In sum, the provisions of Title III underscored the importance of individual privacy in relation to the police power of the government.⁵¹ Title III was significant at both the federal and the state level. At the federal level, it provided protection beyond bare constitutional requirements for privacy interests threatened by the advances of technology.⁵² As to the states, it established an unprecedented minimum require-

illegal police conduct by refusing to allow the benefits of the misconduct into evidence. *In re Proceedings to Enforce Grand Jury Subpoenas*, 430 F. Supp. 1071, 1072-73 (E.D. Pa. 1977). Evidence which fell within an exception was not suppressed. See *United States v. Cianfrani*, 573 F.2d 835, 859-60 (3d Cir. 1978) (consensually acquired communication was lawful and was not subject to suppression); see also C. FISHMAN, *supra* note 44, at 408 (burden of proof in suppression motion is on moving party to show by preponderance of evidence that evidence in question was unlawfully acquired).

⁴⁸ *United States v. Rose*, 669 F.2d 23, 25 (1st Cir. 1982); see also *United States v. Carroll*, 332 F. Supp. 1299, 1301 (D.D.C. 1971) (reasonable expectation of privacy was additional element of statutory definition of oral communication).

⁴⁹ *United States v. Rose*, 669 F.2d 23, 25 (1st Cir. 1982); see also C. FISHMAN, *supra* note 44, at 37 (if communication were not deemed "oral," law enforcement officers could intercept it without a warrant). The speaker's subjective intent and the place of the communication were not conclusive evidence of whether he had a reasonable expectation of privacy. S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2177, 2178. An expectation of privacy in certain places, however, such as an open field or a jail cell, was considered unreasonable. *Id.*; see, e.g., *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.) (prisoner knew that prison officials often monitored telephone conversations, so monitored conversation was not illegal under Title III), *cert. denied*, 446 U.S. 941 (1980); *United States v. McLeod*, 493 F.2d 1186, 1188 (7th Cir. 1974) (words spoken loudly were revealed to public and were not subject to protection); see also *supra* note 38. Plaintiffs who had a reasonable expectation of some privacy, but not total privacy, were allowed to sue under Title III because they were unaware of the specific nature of the invasion of their privacy. *Bianco v. American Broadcasting Cos.*, 470 F. Supp. 182, 185 (N.D. Ill. 1979).

⁵⁰ *United States v. Banks*, 374 F. Supp. 321, 327 (W.D.S.D. 1974); see also *United States v. Carroll*, 332 F. Supp. 1299, 1301 (D.D.C. 1971); C. FISHMAN, *supra* note 44, at 38-39 (no reasonable expectation of privacy was required to protect wire communication from warrantless interception).

⁵¹ *United States v. Cianfrani*, 573 F.2d 835, 856 (3d Cir. 1978).

⁵² C. WHITEBREAD, *supra* note 14, at 70; see also *United States v. Mainello*, 345 F. Supp. 863, 871 (E.D.N.Y. 1972) (Title III particularizes fourth amendment requirements for wiretapping).

ment for legislation governing wiretaps and eavesdropping.⁵³

Courts applied Title III to electronic surveillance cases with little difficulty⁵⁴ until it became necessary to categorize radio-telephone communications as either wire or oral.⁵⁵ The United States Court of Appeals for the Ninth Circuit addressed this problem in *United States v. Hall*.⁵⁶ In *Hall*, a defendant installed radio-telephones in two of his vehicles, and a housewife, while listening to her radio, intercepted the defendants' conversations.⁵⁷ After listening to several calls, the housewife became suspicious and told state authorities about the conversations she had overheard.⁵⁸ The state officials, without a warrant, began electronic surveillance of the defendants' communications, which eventually resulted in their arrest on drug charges.⁵⁹

The accused claimed that their conversations were protected under Title III.⁶⁰ In order to decide whether Title III protected such conversations, the court looked to the statute to determine if radio-

⁵³ *United States v. Tortorello*, 480 F.2d 764, 771-72 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). The Federal Communications Act of 1934, the forerunner of Title III, did not require states to comply with its provisions. *See supra* note 24; *see also* *Commonwealth v. Chiatt*, 380 Pa. 532, 112 A.2d 379, 383 (1955) (some states had impliedly permitted wiretapping by allowing use of wiretap evidence in criminal cases).

Under Title III, states may not pass laws containing provisions less restrictive than the federal requirements, but they may choose to adopt more stringent standards. S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2177, 2187; *see also*, J. CARR, *supra* note 20, at 29 (state laws may be more rigorous than Title III standards, though not less).

⁵⁴ *See, e.g.*, *Gelbard v. United States*, 408 U.S. 41, 46 (1972) (violation of Title III was used in unsuccessful effort to suppress evidence); *United States v. Mainello*, 345 F. Supp. 863, 872 (E.D.N.Y. 1972) (electronic surveillance over 50 day period was not excessive under Title III where investigation was of large illegal gambling business and probable cause was established).

⁵⁵ *See United States v. Hall*, 488 F.2d 193, 196 (9th Cir. 1973) (conversations via radio-telephones classified as "oral communication" under Title III); *United States v. Carroll*, 332 F. Supp. 1299, 1300 (D.D.C. 1971) (classification of communication as wire or oral under Title III).

⁵⁶ 488 F.2d 193 (9th Cir. 1973).

⁵⁷ *Id.* at 194-95. The housewife's radio was a type commonly available on the open market. *Id.* The radio could pick up fire and police calls as well as mobile telephone calls. *Id.* at 195.

⁵⁸ *Id.* She listened to the defendants' conversations for approximately a month before informing the Arizona Department of Public Safety. *Id.*

⁵⁹ *Id.* The defendants were charged with possession of marijuana with intent to distribute. *Id.* at 194.

⁶⁰ *Id.* The defendants claimed that the surveillance of their conversations violated Title III, the fourth amendment and the Federal Communications Act of 1934. *Hall*, 488 F.2d at 194; *see supra* note 24.

telephone conversations were oral or wire communications.⁶¹ The court stressed the fact that the classification of the communications in question was crucial.⁶² If the communications were categorized as oral, the *Katz* expectation of privacy test applied.⁶³ If they were classified as wire, however, evidence of the conversations would be suppressed because it was obtained without a warrant.⁶⁴ Noting that the definition of "wire communication" was capable of several interpretations,⁶⁵ the court construed the definition by reading it in conjunction with another Title III section⁶⁶ and concluded that conversations via two radio-telephones were oral.⁶⁷ The court recognized, however, that some of the defendants' conversations were conducted using a radio-telephone and a normal land-line telephone⁶⁸ and that, despite the apparent logic

⁶¹ *Hall*, 488 F.2d at 196. For the Title III definitions of oral and wire communications see *supra* notes 42-43.

⁶² *Hall*, 488 F.2d at 196.

⁶³ *Id.*; see *supra* notes 35-38 and accompanying text. The purpose of having a more restrictive requirement for oral communication was to afford privacy where it was due. One who talked by telephone reasonably took privacy for granted. That assumption of privacy, however, was not usually true for nonwire communications. See *J. CARR, supra* note 20, at 65-66. Hence, to receive fourth amendment protection in an oral communication, a participant had to show that he had a reasonable expectation of privacy. *Hall*, 488 F.2d at 196; see *United States v. Rose*, 669 F.2d 23, 27 (1st Cir. 1982)(evidence obtained because of intercepted ham radio communication was not suppressed because there had been no reasonable expectation of privacy); *Bianco v. American Broadcasting Cos.*, 470 F. Supp. 182, 185 (N.D. Ill. 1979)(to prove reasonable expectation of privacy, plaintiff must show only that he had no expectation that his conversation was being intercepted through use of electronic devices).

⁶⁴ *Hall*, 488 F.2d at 198; see *supra* note 47 and accompanying text.

⁶⁵ *Hall*, 488 F.2d at 196. The court stated that the definition of wire communication under Title III was ambiguous since it could be interpreted literally to mean that if a wire aided the communication in any way, then the communication would be considered a wire communication. The court reasoned that such an interpretation would turn simple radio use into a wire communication because wires were in the transmitter. This interpretation was rejected in favor of a more conservative approach. *Id.*

⁶⁶ *Id.* The court construed the definition of wire communication in conjunction with 18 U.S.C. § 2511(2)(b)(1980), and found that an interpretation of a radio communication as wire was inconsistent with the statute. *Hall*, 488 F.2d at 196. Section 2511 allows an agent of the F.C.C., in particular instances, "to intercept a wire communication or an oral communication transmitted by radio." 18 U.S.C. § 2511(2)(b)(1982).

⁶⁷ *Hall*, 488 F.2d at 196. The court stated that communicating through radio waves was more like sending messages by using a loud voice because all who had the ability to listen were invited to do so. *Id.*; see *United States v. Hoffa*, 385 U.S. 293, 300-03 (1966)(conversations recorded by equipment concealed on undercover government agent were not protected because defendant took risk by revealing information to confidant); *supra* note 49.

⁶⁸ *Hall*, 488 F.2d at 197.

of classifying such communications as oral,⁶⁹ congressional intent indicated that they be categorized as wire.⁷⁰ Therefore, conversations where both parties used radio-telephones were adjudged to be oral communications and conversations where the parties used both a radio-telephone and a land-line telephone were adjudged to be wire communications.⁷¹

The result in *Hall* was considered anomalous by many and was criticized and rejected in *Dorsey v. State*.⁷² In *Dorsey*, the defendants moved to suppress evidence that had been acquired by intercepting messages carried over an electronic paging device.⁷³ The defendants alleged that since a court order was not obtained before intercepting the messages, the interceptions were illegal wiretaps, and that any evidence obtained as a result of them should be suppressed.⁷⁴ The Florida Supreme Court reviewed the definition of wire communication⁷⁵ and decided that messages carried over an electronic paging device were not wire communications.⁷⁶ In reaching this decision, the court acknowl-

⁶⁹ *Id.* The court stated that all conversations crossing the airwaves would be included within the same rule whether or not the conversation originated or ended on a land-line telephone. The court noted that a different result seemed absurd. *Id.*

⁷⁰ *Id.* The court explained that the legislative history called for the term "wire communication" to encompass all communications transmitted by a common carrier. The court further noted that Congress intended for the definition of wire communication to provide comprehensive coverage. Consequently, since no legislative history of Title III mentioned a radio-telephone, it was decided that a warrant would be required when intercepting a wire communication or a communication that was transmitted to or from a land-line telephone. *Id.*

⁷¹ *Id.* The court made its decision even though it recognized that the results would be harsh since Title III called for criminal penalties upon violation. *Id.*; see 18 U.S.C. §§ 2511, 2520(1982); see also *supra* note 45 and accompanying text. But see *Hall*, 488 F.2d at 200 (Ferguson, J., dissenting in part)(since statute was clear, there was no need for consulting legislative history).

⁷² 402 So. 2d 1178 (Fla. 1981).

⁷³ *Id.* at 1182. Electronic paging devices were commonly called beepers. A beeper was a pocket-sized pager that one could carry with him and use to receive messages. A message would be turned into radio waves and transmitted to the one carrying the beeper. Any other person having his radio tuned to the same frequency could also hear the message. *Id.*

⁷⁴ *Id.* at 1183. The defendants based their motion to suppress on the contention that communication via electronic paging devices should be classified as wire communication and should, therefore, require a warrant for interception regardless of one's expectation of privacy. *Id.*

⁷⁵ *Id.* The Florida statute that governed wiretapping was very similar to Title III. *Id.*; see FLA. STAT. ANN. § 934.02 (West 1973)(defined wire and oral communication in manner similar to Title III and made warrantless interception of either unlawful); see *supra* note 42 and accompanying text.

⁷⁶ *Dorsey*, 402 So. 2d at 1183.

edged *Hall*, but rejected its holding because it considered the result absurd.⁷⁷ The Florida court noted that statutes must be interpreted so as to avoid absurd results.⁷⁸ It determined that the Florida statute governing wiretaps could be construed to avoid the prerequisite of a warrant before legally intercepting transmissions through public airwaves.⁷⁹ The court held that the interception of wire communications was illegal only as to the part of a communication that was literally transferred by wire and not transmitted in a way accessible to the public.⁸⁰ Since a message carried by an electronic paging device could be heard by anyone who tuned his radio to the appropriate frequency, the court deemed such communications to be oral.⁸¹ The court concluded that a person who sent or received signals through an electronic paging device had no reasonable expectation of privacy⁸² and consequently was not protected by either a constitutional right or by the state law governing wiretaps.⁸³

In the instant case, the Kansas Supreme Court reasoned that because the crucial issue was whether the communication was "oral" or "wire,"⁸⁴ the congressional purpose of Title III must be considered in the decision.⁸⁵ Congress had intended that Title III not only safeguard

⁷⁷ *Id.*; see *United States v. Paul*, 614 F.2d 115, 119 (6th Cir. 1980)(Phillips, J., concurring)(stated that *Hall* decision was absurd).

⁷⁸ *Dorsey*, 402 So. 2d at 1183; see also *United States v. Bryan*, 399 U.S. 323, 338 (1950)(Supreme Court would not render decision contradictory to legislative intent or which produced absurd results). The *Dorsey* court stated that its interpretation of the Florida statute was rational and sensible. *Dorsey*, 402 So. 2d at 1183.

⁷⁹ *Dorsey*, 402 So. 2d at 1183.

⁸⁰ *Id.* The court noted that it would be ridiculous to include messages transmitted by a public address system within the definition of wire communication. The court, emphasizing the broadcast nature of the paging device, stated that it would be nonsensical to classify television or radio signals that were transmitted with no reasonable expectation of privacy and that were accessible to the public as wire communication. *Id.*

⁸¹ *Id.* at 1184.

⁸² *Id.* at 1183-84. The court stressed that anyone transmitting messages by an electronic paging device should realize that the messages could be heard by anyone who was tuned to the proper FM frequency and wanted to listen to them. *Id.*

⁸³ *Id.* The evidence obtained by the interception of electronic paging device messages was admitted at trial. *Id.*

⁸⁴ *Howard*, 679 P.2d at 204.

⁸⁵ *Id.* at 204-05. The court stated that congressional intent was the primary consideration in the construction of a statute. Even though words or phrases had to be omitted or introduced, congressional intent would control when that intent could be discovered by examination of the statute. *Id.* at 204. The Kansas Supreme Court noted that congressional intent was determined by the language utilized in the statute, the history of the Act, the conditions surrounding its passage and the expected results of the statute. The court also noted that statutes should be interpreted by reading all of the sections

one's right to privacy, but also that it provide a guideline for using electronic surveillance devices.⁸⁶ The court determined that since "wire communications" included only those parts of a radio-telephone conversation that were actually transmitted by a wire,⁸⁷ those parts of the conversation that were transmitted through the open airwaves and that were easily accessible to the public were oral communications.⁸⁸

The court concluded that since one of the defendants possessed a cordless telephone owner's manual which explained that communications through the cordless telephone traveled over open airwaves,⁸⁹ and since the defendant who used the cordless telephone thus had no reasonable expectation of privacy, the lower court erred in suppressing the state's evidence of the intercepted cordless telephone communications.⁹⁰

In *State v. Howard*, the Kansas Supreme Court effectively turned its back on the congressional intent underlying Title III. The court narrowly construed the definition of wire communication to include only the portion of a radio-telephone conversation that was actually transmitted by wire.⁹¹ Because Title III does not contain such a narrow definition,⁹² the Kansas court relied upon the definition set forth in

together rather than separately. *Id.* at 204-05; see *supra* note 41 and accompanying text. It further emphasized that interpretation of a statute should never lead to doubt, injustice or perplexity. *Howard*, 679 P.2d at 205. The court also stated that the Kansas courts and the United States Supreme Court have determined that penal statutes are to be strictly construed. *Id.*; see *supra* note 45 and accompanying text.

⁸⁶ *Howard*, 679 P.2d at 205. The court also considered the American Bar Association's standards dealing with electronic surveillance. The Advisory Committee of the American Bar Association's STANDARDS OF ELECTRONIC SURVEILLANCE stated that a penal law system should preserve both privacy and justice equally so that no more importance is placed on the punishment of criminals than on the preservation of privacy. The objectives of the ABA in setting standards for electronic surveillance were the preservation of privacy and the advancement of justice. *Howard*, 679 P.2d at 205-06.

⁸⁷ *Id.* at 206. The court studied the definition of "wire communication" in 18 U.S.C. § 2510(1). See *supra* note 42.

⁸⁸ *Howard*, 679 P.2d at 206. The court added that the rules prescribed by Title III for oral communication should be applied to radio-telephone conversations. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; see *supra* notes 35-39, 48-50 and accompanying text (discussion of reasonable expectation of privacy test). The Kansas Supreme Court emphasized that anyone with a standard FM radio could have heard the defendants' conversation. The court pointed out, however, that this decision did not affect or apply to those persons using land-line telephones without knowledge that the conversation was being carried to a cordless telephone. *Howard*, 679 P.2d at 206.

⁹¹ *Howard*, 679 P.2d at 206.

⁹² See *supra* note 42.

Dorsey v. State.⁹³ The *Dorsey* court, however, admitted that it purposely interpreted Title III so as to avoid the prerequisite of obtaining a warrant before intercepting messages transmitted over public airwaves.⁹⁴ Thus, it is evident that the Kansas court deliberately used the definition in *Dorsey* to allow authorities greater access to private conversations between citizens.

Additionally, even though the Kansas Supreme Court acknowledged the value of the reasonable expectation of privacy test developed in *Katz*,⁹⁵ it apparently chose to disregard it. Under the *Katz* test, if defendants reasonably expected their conversations to be private and the circumstances justified such expectations, then any evidence obtained through unauthorized interceptions thereof should be suppressed by the court.⁹⁶ The defendants in the instant case had an actual, subjective expectation that their communications were not being intercepted by an electronic device.⁹⁷ The issue, then, was whether the defendants' expectation was reasonable.⁹⁸ According to the Kansas court, the owner's manual clearly stated that cordless telephone conversations traveled through open airwaves and were easily accessible to the public.⁹⁹ Hence, the court held that the defendant using the radio-telephone could not reasonably expect his conversations to be private.¹⁰⁰

Nevertheless, the potential is great that an ordinary purchaser may fail to notice such a warning in his owner's manual unless it appears in large bold letters. If the owner's manual had stated in large bold letters that cordless telephone communications were publicly accessible, a defendant under these facts would have been properly informed of the chances of being overheard and would have had no reasonable expectation of privacy. Unfortunately, the Kansas Supreme Court did not consider the manner in which the warning was presented in the owner's manual.¹⁰¹ Moreover, it would appear that the court cited *Katz* as support without fully applying the reasonable expectation of privacy test to the facts of the case.¹⁰²

⁹³ See *supra* notes 75-76 and accompanying text.

⁹⁴ *Dorsey*, 402 So. 2d at 1183; see *supra* note 79 and accompanying text.

⁹⁵ *Howard*, 679 P.2d at 202.

⁹⁶ See *supra* notes 35-39 and accompanying text.

⁹⁷ *Howard*, 679 P.2d at 200; see *supra* note 37 and accompanying text.

⁹⁸ See *supra* note 38 and accompanying text.

⁹⁹ *Howard*, 679 P.2d at 199, 206.

¹⁰⁰ *Id.* at 206.

¹⁰¹ See *id.* at 199, 206.

¹⁰² See *supra* notes 36-39 and accompanying text.

To end the controversy of whether communication by cordless telephone is wire or oral, and if oral, whether a speaker has a reasonable expectation of privacy, it would seem appropriate for Congress to determine how such communication should be classified and then for Congress to modify Title III accordingly. Congress, and not the Kansas Supreme Court, is the proper branch of government to determine classifications under Title III. Were Congress to amend Title III to include a specific classification for cordless telephone communications, future injustices and inconsistent judicial decisions would be significantly reduced if not prevented entirely. Only such congressional action can produce clear guidance for law enforcement agencies as well as more consistent court decisions.

Laurie M. Maddox



FEDERAL COURTS — DIVERSITY JURISDICTION — CITIZENSHIP OF
ADMINISTRATOR DISREGARDED ONLY WHEN FACTUALLY DETERMINED
THAT ADMINISTRATOR WAS NAMED WITH MOTIVE TO MANUFACTURE
DIVERSITY

Plaintiff,¹ administratrix of decedent's estate,² filed a wrongful death action against three defendants³ in the United States District Court for the Southern District of Mississippi.⁴ Plaintiff invoked federal jurisdiction based on diversity of citizenship.⁵ In their answer defendants alleged that the plaintiff had been named administratrix solely to create diversity of citizenship and therefore under 28 U.S.C. § 1359⁶ diversity jurisdiction was not conferred.⁷ The district court dismissed the action for lack of jurisdiction, concluding that plaintiff was a straw fiduciary because she had no stake in the outcome of the action and was appointed administratrix solely for the purpose of creating diversity.⁸ On appeal, the United States Court of Appeals for the Fifth

¹ Plaintiff, aunt of the decedent, was named administratrix by order of a Mississippi chancery court. *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 394 (5th Cir. 1984). The parents of the decedent were psychologically unable to pursue the suit and believed that, of their relatives and acquaintances, only the plaintiff had sufficient ties with the family to serve as the administratrix of the estate during the impending litigation. *Id.*

² *Id.* After taking a cold medication the decedent, an eleven-year-old girl, contracted aplastic anemia which resulted in her death. *Id.*

³ *Id.* The defendants were Parke-Davis Pharmaceutical Division of Warner-Lambert Company, the manufacturer of the medication; Leonard S. Pickle, doing business as Pickle's Rexall Drugs, the supplier of the medication; and Dr. George Moss, the physician who prescribed the medication to the decedent. *Id.* at 392, 394.

⁴ *Id.* at 394.

⁵ *Id.* The plaintiff was a resident of Louisiana, whereas the decedent, her parents, and two of the three defendants were residents of Mississippi. *Id.*

Diversity of citizenship confers federal jurisdiction through the operation of 28 U.S.C. § 1332 (1982), which provides that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000 and is between citizens of different states. *See id.*

⁶ 28 U.S.C. § 1359 (1982) [hereinafter cited as § 1359] provides that "a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *Id.*

⁷ *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d at 392, 394 (5th Cir. 1984).

⁸ *Id.* The district court looked to the citizenship of the beneficiaries, who were Mississippi residents, and concluded that they lacked diversity with defendants Moss and Pickle, who were also Mississippi residents. Accordingly, the court dismissed the suit on

Circuit, *held*, reversed and remanded.⁹ The citizenship of an administratrix will control a diversity inquiry unless there is a factual determination that the administratrix has been named with the motive or purpose of manufacturing diversity. *Bianca v. Parke-Davis Pharmaceutical Division*, 723 F.2d 392 (5th Cir. 1984).

Congress initially recognized the importance of preventing the manufacture of diversity jurisdiction by incorporating into the Judiciary Act of 1789 an assignee clause,¹⁰ which prevented the creation of jurisdiction by the assignment of a chose in action to an assignee of diverse citizenship.¹¹ Congress amended the assignee clause in the Act of March 3, 1875, which was designed to prevent collusive or improper joining of a diverse party.¹² The ambiguity of the amended provision, however, prevented a clear understanding of its scope.¹³ Because these efforts failed to fully prevent manufactured diversity jurisdiction,¹⁴ in

the basis of lack of jurisdiction. *Id.*

⁹ *Id.* at 399.

¹⁰ Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78-79. This clause, also known as the anti-assignment clause, generally provided that federal courts would not have jurisdiction over an action brought by an assignee unless the action could have been brought in a federal court had there been no assignment. *See id.*

¹¹ *See* 28 U.S.C. § 1359 note (1982)(reviser's note). *See generally* 3A J. MOORE, MOORE'S FEDERAL PRACTICE § 17.06 (2d ed. 1984)(history and jurisdictional effect of anti-assignment clause until its repeal); Cohan & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201, 202-05 (1956)(discussion of history and bases of anti-assignment and anti-collusion clauses; interpretation of these provisions in early cases).

¹² *See* Judiciary Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472. Congress provided that if the parties to a suit had been improperly or collusively made or joined for the purpose of creating a case cognizable by or removable to federal court, then the court should dismiss the suit or remand it to state court. *See id.* By enacting this provision Congress hoped to prevent federal court dockets from becoming overcrowded with suits which fell outside the courts' purview under the Constitution or 28 U.S.C. § 1332 (1982). Cohan & Tate, *supra* note 11, at 209; *see* 28 U.S.C. § 1359 note (1982)(reviser's note)(anti-collusion clause had unlimited coverage and direct approach).

¹³ Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 ILL. L. REV. 566, 569-71 (1941).

¹⁴ *See* Cohan & Tate, *supra* note 11, at 207-08. The anti-assignment clause and its later amended versions did not completely serve their intended purpose. The clause barred some bona fide assignments from the federal courts and allowed other assignments whose only purpose was to create diversity jurisdiction. *See* Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000, 1006 (D.C. Vt. 1967)(discussion of partial effectiveness of anti-assignment clause); C. WRIGHT, THE LAW OF FEDERAL COURTS § 31, at 165 (4th ed. 1983)(discussion of anti-assignment clause and its complex language and limited use in certain choses of action).

In spite of the anti-assignment and anti-collusion provisions, federal courts generally held that the citizenship of an appointed representative determined the issue of diversity

1948 Congress enacted 28 U.S.C. § 1359 and stated that the section's jurisdictional bar applied to all cases where the assignment was improperly or collusively made to invoke diversity jurisdiction.¹⁵

In the decades immediately following its enactment, section 1359 was narrowly construed by the federal courts.¹⁶ The citizenship of the appointed representative remained the decisive factor in determining diversity jurisdiction.¹⁷ The leading case during the first years after the enactment of section 1359 was *Corabi v. Auto Racing, Inc.*,¹⁸ in which the United States Court of Appeals for the Third Circuit unanimously held that the resignation of a resident administratrix and the subsequent appointment of a nonresident administrator in a wrongful death action was not collusive or in violation of section 1359, even though such transfer of administrative duties was made expressly to create diversity of citizenship.¹⁹ Relying primarily on a decision rendered prior to the enactment of section 1359,²⁰ the court rejected motive as a test

and seldom inquired into the reasons underlying the representative's appointment. See *Mecum v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189-90 (1931)(administrator's citizenship determinative of diversity regardless of parties' motivation or purpose); *Childress v. Emery*, 21 U.S. (8 Wheat.) 642, 668-69 (1823)(citizenship of executors, and not that of testators, was determinative of diversity); *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808)(same). In *Mecum*, the decedent's widow served as administratrix of her husband's estate and brought three separate actions in state court against the defendant, a nonresident. *Mecum*, 284 U.S. at 184-85. After the defendant removed the action to federal court three times, the widow resigned as administratrix and had *Mecum* appointed administrator solely because his citizenship was the same as that of the defendant. *Id.* When *Mecum* brought the same action against the defendant, the Court held that *Mecum's* citizenship was determinative of diversity and thus the suit was not removable to federal court. *Id.* at 189-90. Cases citing *Mecum* as precedent for holding that appointment of an administrator for the sole purpose of creating diversity did not violate § 1359 included *McCoy v. Blakely*, 217 F.2d 227, 230-31 (8th Cir. 1954) and *Jaffe v. Philadelphia & W.R.R.*, 180 F.2d 1010, 1012-13 (3rd Cir. 1950) *overruled*, 402 F.2d 867, 876 (3d Cir. 1968). See also Comment, *Manufacturing Federal Diversity Jurisdiction and Section 1359*, 69 COLUM. L. REV. 706, 717 (1969)(early courts refused to examine motive in determining the applicability of § 1359 because of Supreme Court decision in *Mecum*).

¹⁵ See Act of June 25, 1948, ch. 646, § 1359, 62 Stat. 935 (1948)(codified at 28 U.S.C. § 1359 (1982)). Section 1359 was based on the anti-assignment and anti-collusion clauses found at § 41(1) and § 80 of title 28 of the 1940 edition of the United States Code. 28 U.S.C. § 1359 note (1982)(reviser's note).

¹⁶ See *infra* notes 18-21 and accompanying text.

¹⁷ See *infra* notes 18-21 and accompanying text. See generally Comment, *supra* note 14, at 717-26 (discussion of history of § 1359, including reluctance of early courts to apply § 1359 and the search for adequate standards of application).

¹⁸ 264 F.2d 784 (3d Cir. 1959).

¹⁹ *Id.* at 788.

²⁰ See *id.* at 787. The court relied primarily on *Black & White Taxicab & Transfer*

for determining whether an act was improper or collusive within the meaning of the statute.²¹

In 1968, however, the Third Circuit, in *McSparran v. Weist*,²² overruled *Corabi*.²³ The record in *McSparran* clearly indicated that the nonresident guardian was chosen solely to create diversity jurisdiction and to bring suit in federal court.²⁴ The *McSparran* court held that although a guardian had the capacity to sue on behalf of his ward by

Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 518-25 (1928). See *Corabi*, 264 F.2d at 787. In *Black & White Taxicab & Transfer Co.*, it was alleged that a Tennessee corporation had been created to manufacture diversity of citizenship and thus avoid Kentucky law. *Black & White Taxicab & Transfer Co.*, 276 U.S. 518, 523. The Supreme Court upheld federal jurisdiction and stated that where the transfer of a business from one state to another was neither feigned nor colorable, then the Court would not inquire into the motive behind the transfer when deciding the issue of diversity. *Id.* at 524.

²¹ *Corabi*, 264 F.2d at 786-88; see *McCoy v. Blakely*, 217 F.2d 227, 230 (8th Cir. 1955)(even if sole purpose of appointment of nonresident administrator was to create diversity of citizenship in order to invoke federal court jurisdiction, this fact alone would not violate § 1359); *Jaffe v. Philadelphia & W.R.R.*, 180 F.2d 1010, 1012-13 (3d Cir. 1950)(decree of state probate court appointing administratrix could not be collaterally attacked; inquiry into purpose and motive behind appointment not allowed), *overruled*, 402 F.2d 867, 876 (3d Cir. 1968). But see *Martineau v. City of St. Paul*, 172 F.2d 777, 780 (8th Cir. 1949)(appointment of nonresident guardian for sole purpose of creating diversity would not turn local controversy into one involving citizens of different states or confer jurisdiction upon federal district court).

The *Corabi* court found that the definitions of "collusion" and "improperly" did not apply to the circumstances of the case. *Corabi*, 264 F.2d at 788. The court stated that collusion generally referred to an illegal agreement between opposing parties rather than to an act of one side only. *Id.* In conclusion, the court stated that if Congress intended for the jurisdictional bar of § 1359 to apply under the circumstances found in the case, it could have omitted the words "collusively" or "improperly," and that any change in what the court deemed to be the law should not emanate from the court itself. *Corabi*, 264 F.2d at 788; see also *Jamison v. Kammerer*, 264 F.2d 789, 789 (3d Cir. 1959)(per curiam)(administrator's citizenship determinative of diversity). *Jamison*, decided the same day as *Corabi*, upheld federal jurisdiction where the administrator was named merely to create diversity. *Jamison*, 264 F.2d at 789. The court in *Jamison* noted that the administrator had been named to create diversity in 33 additional civil actions, but stated that if a cure was needed for this situation the cure could not come from the court. *Id.*

²² 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 401 U.S. 975 (1969).

²³ *McSparran*, 402 F.2d at 876. See generally Comment, *supra* note 14, at 719-22 (discussion of Third Circuit's abrupt reversal of its policy announced in *Corabi* for determining propriety of diversity jurisdiction).

²⁴ See *McSparran*, 402 F.2d at 869. In *McSparran*, a minor had petitioned for the appointment of a guardian of his estate for the express purpose of instituting proceedings in federal district court to recover for injuries sustained in an automobile accident with the defendants. *Id.* at 868.

virtue of rule 17(c) of the Federal Rules of Civil Procedure,²⁵ the guardian's citizenship would not create diversity when he was merely a straw party with no substantial interest in the dispute.²⁶ While noting that generally courts would not inquire into the motive behind the appointment of a personal representative,²⁷ the court analyzed the origins and meaning of section 1359 and concluded that under the language of the statute it was difficult to ignore motive when ascertaining the purpose of a representative's appointment.²⁸ Other circuits soon adopted the Third Circuit's broader interpretation of section 1359.²⁹

²⁵ FED. R. CIV. P. 17(c) provides that "[w]henever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person." *Id.* The *McSparran* court stated that rule 17 focused on the capacity to sue and did not purport to establish standards for a diversity determination. *McSparran*, 402 F.2d at 870. See generally 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1556-1557 (1971)(effect of rule 17 on diversity jurisdiction and on collusive creation of diversity jurisdiction).

²⁶ *McSparran*, 402 F.2d at 874.

²⁷ *Id.* at 874-75; see, e.g., *Mecum v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189-90 (1931)(motive or purpose for obtaining appointment of administrator was immaterial in determination of diversity).

²⁸ *McSparran*, 402 F.2d at 874-75; see *Esposito v. Emery*, 402 F.2d 878, 880 (3d Cir. 1968)(appointment of straw guardian solely to create diversity jurisdiction was insufficient to confer jurisdiction upon federal courts)(companion case to *McSparran*); see also Comment, *Intent to Create Diversity—A New Test for Collusiveness*, 56 GEO. L.J. 1205, 1213-15 (1968)(motive test justified by historical and legislative intent of § 1359).

²⁹ See, e.g., *O'Brien v. AVCO Corp.*, 425 F.2d 1030, 1034 (2d Cir. 1969)(discussion of significance of *McSparran* and adoption of the court's interpretation and application of § 1359); *Lester v. McFaddon*, 415 F.2d 1101, 1104 (4th Cir. 1969)(adoption of reasoning in *McSparran* opinion). In *Lester*, the Fourth Circuit applied § 1359 after determining that the administrator was a straw party who possessed no stake in the litigation. 415 F.2d at 1104, 1106. The *Lester* court relied on a two-part standard which consisted of a lack of stake in the outcome coupled with an improper motive to create diversity jurisdiction where diversity would not otherwise exist. *Id.* at 1106 n.11. The court further provided that if either factor were absent, the action would not be collusive or improper. *Id.*

During this time the American Law Institute recommended a standard to determine citizenship of the parties for purposes of diversity jurisdiction. The standard promulgated by the American Law Institute, which was favorably commented upon by many courts, proposed that the citizenship of a representative be deemed that of the party whom he represents. A.L.I., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1301(b)(4)(1968). This standard would obviate inquiry into the motive underlying the appointment of the representative. See generally J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139-52 (1973)(proposition that standard adopted by American Law Institute was significant interim step to remove state court cases from federal courts); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 15-18 (1968)(discussion of ramifications of standard proposed by American

The United States Supreme Court approved this broad interpretation of section 1359 in *Kramer v. Caribbean Mills, Inc.*,³⁰ which involved an action brought by an assignee to collect a debt owed by the defendant.³¹ The plaintiff in *Kramer* admitted his assignment was substantially motivated by a desire to create diversity,³² leading the Court to conclude that the assignment was improperly or collusively made within the meaning of the statute.³³ The Court, however, specifically declined to consider whether the appointment of a nonresident administrator to obtain diversity jurisdiction was improper or collusive.³⁴ Nonetheless, *Kramer* was read by the various circuits as ending that line of cases in which the citizenship of an appointed representative was determinative of jurisdiction even when such appointment was made solely to create diversity.³⁵

While both *McSparran* and *Kramer* indicated that a broader interpretation of section 1359 was appropriate,³⁶ conflicts soon arose

Law Institute for determining diversity). This proposal has yet to be adopted. *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 396 n.4 (5th Cir. 1984).

³⁰ 394 U.S. 823 (1969).

³¹ *Id.* at 824. In *Kramer*, Caribbean Mills, Inc., a Haitian corporation, owed \$165,000 to a Panamanian corporation. In exchange for one dollar, the Panamanian company assigned its claim to Kramer, a Texas attorney. By separate agreement Kramer was to pay the Panamanian company 95% of any net recovery on the claim as a "bonus." *Id.* The Supreme Court concluded that the assignment was made for the purposes of collecting the debt and creating diversity jurisdiction, since Kramer had no connections with the Panamanian company prior to the assignment. *Id.* at 827-28.

³² *Id.* at 828.

³³ *Id.* The Court stated that the assignment fell "not only within the scope of § 1359 but within its very core." *Kramer*, 394 U.S. at 830. The Court concluded that such manufactured diversity was "the very thing Congress intended to prevent when it enacted § 1359 and its predecessors." *Kramer*, 394 U.S. at 829.

³⁴ *Kramer*, 394 U.S. at 828 n.9. The Supreme Court noted that cases involving representatives vary in certain respects from those in which jurisdiction was based on assignments and stated that in the pending litigation it was not necessary to decide whether those distinctions amounted to a difference for the purposes of § 1359. Although the Court cited *McSparran*, it did not specifically approve of the holding adopted in that opinion. *Kramer*, 394 U.S. at 828 n.9.

³⁵ See, e.g., *Rogers v. Bates*, 431 F.2d 16, 20-21 (8th Cir. 1970) (appointment of conservator for purpose of creating diversity was analogous to assignment procedure used in *Kramer* and thus fell within ban of § 1359); *O'Brien v. AVCO Corp.*, 425 F.2d 1030, 1035-36 (2d Cir. 1969) (appointment of administrator to create diversity indistinguishable from assignment involved in *Kramer*); *Lester v. McFaddon*, 415 F.2d 1101, 1104 (4th Cir. 1969) (*Kramer* substantially eliminated effect of earlier dicta which had precluded inquiry into motive). See generally C. WRIGHT, *supra* note 14, at 167-69 (interpretation and application of *McSparran* and *Kramer*).

³⁶ See, e.g., *Bass v. Texas Power & Light Co.*, 432 F.2d 763, 765 (5th Cir. 1970) (narrow construction of § 1359 rejected by *Kramer* and *McSparran*). See generally Note,

among the circuits regarding the application of the statute.³⁷ As courts addressed section 1359 in the years following *McSparran* and *Kramer*, the central question was what standard to apply in deciding whether a party was collusively or improperly joined for the purpose of creating diversity jurisdiction.³⁸ The standards most frequently applied were based on either the motive underlying the appointment of the representative³⁹ or the substantiality of the representative's stake in the litigation.⁴⁰

The Fifth Circuit addressed the issue of the application of section 1359 to the appointment of an out-of-state administrator in *Bass v. Texas Power & Light Co.*⁴¹ In *Bass*, the plaintiff admitted that his appointment as administrator was made for the sole purpose of creating diversity.⁴² In an opinion quoting at length from *McSparran*,⁴³ the Fifth Circuit embraced the motive standard for determining the application of section 1359 and thereby imposed the jurisdictional bar

Civil Procedure: Manufacture of Diversity in Wrongful Death Actions, 34 OKLA. L. REV. 796, 800-02 (1981)(*McSparran* signalled a "frontal attack" upon the entrenched philosophy of *Mecum* and *Corabi*).

³⁷ See *infra* notes 57-65 and accompanying text.

³⁸ See *infra* note 65.

³⁹ See, e.g., *White v. Lee Marine Corp.*, 434 F.2d 1096, 1098-99 (5th Cir. 1970)(factual determination of whether appointment of representative was collusive or improper involved inquiry into purpose of appointment); *Green v. Hale*, 433 F.2d 324, 328-29 (5th Cir. 1970)(inquiry into motive behind appointment of administrator essential in determining the applicability of § 1359); *Groh v. Brooks*, 421 F.2d 589, 595 (3d Cir. 1970)(underlying motive in appointment of administrator affects application of the jurisdictional bar of § 1359). But see Comment, *Appointment of Non-Resident Administrator to Create Federal Diversity Jurisdiction*, 73 YALE L.J. 873, 881-82 (1964)(inquiry into motive as a problem of proof).

⁴⁰ See, e.g., *Hackney v. Newman Memorial Hosp., Inc.*, 621 F.2d 1069, 1071 (10th Cir.)(existence of motive to create diversity did not require dismissal of action from federal court when administrator had substantial stake in litigation), *cert. denied*, 449 U.S. 982 (1980); *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35-36 (7th Cir. 1979)(defendant not allowed to remove wrongful death action to federal court when administrator had no substantial stake in action), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980); *Bishop v. Hendricks*, 495 F.2d 289, 295 (4th Cir.)(diversity sustained by citizenship of out-of-state administrator only when administrator had more than nominal relationship to litigation), *cert. denied*, 419 U.S. 1056 (1974).

⁴¹ 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971).

⁴² *Bass*, 432 F.2d at 764. The plaintiff, a citizen of Louisiana, was appointed administrator of decedent's estate in Texas, and as such, brought a wrongful death action in the federal district court of Texas. All statutory beneficiaries of the action were citizens of Texas, and the defendant was incorporated under the laws of Texas. *Id.*

⁴³ See *id.* at 765-66; see *supra* notes 22-28 and accompanying text (discussion of *McSparran*).

against the plaintiff.⁴⁴ The same year, in *Green v. Hale*,⁴⁵ the Fifth Circuit again considered the proper application of section 1359; however, in *Green*, the record was silent on the reasons for the appointment of an out-of-state administrator.⁴⁶ The trial court had not inquired into the motives underlying the appointment of an Oklahoma administrator who had brought a survival action for the estate of a Texas resident.⁴⁷ The *Green* court established a list of factors to be considered in examining the reasons or motives behind an out-of-state appointment.⁴⁸ These factors included the representative's relationship with the party represented; the scope of his power and duties; his capacity or experience as relevant to the purpose of his appointment; the existence of a nondiverse person who might be expected to represent the party; any reasons expressed by the party for choosing a nonresident representative; and whether, apart from the appointment of an out-of-state representative, the suit was wholly local in nature.⁴⁹ The court held that inquiry into the purpose or motive of the appointment was essential under section 1359,⁵⁰ but concluded that the factors should be applied prospectively only.⁵¹

In *White v. Lee Marine Corp.*⁵² the Fifth Circuit applied these factors to determine whether there was an intent to manufacture diver-

⁴⁴ *Bass*, 432 F.2d at 766-67. The court stated that § 1359 was clearly applicable since the plaintiff acknowledged that his appointment was made to create diversity. *Bass*, 432 F.2d at 766. The court expressed no opinion, however, regarding cases where the motive behind the appointment was not admitted or was ambiguous. *Id.* at 766-67.

⁴⁵ 433 F.2d 324 (5th Cir. 1970).

⁴⁶ *Id.* at 328-29.

⁴⁷ *Id.* The plaintiff brought this action on the death of an infant who was a resident of Texas; the three defendants were also Texas residents. *Id.* at 326. At the time suit was filed in *Green*, the *Corabi* decision was still in effect and there was no reason for the trial court to inquire into the motives or purposes of the appointment. *Id.* at 329. Therefore, the trial court accepted the administrator's nonresident status for the purpose of diversity. The issue of manufactured diversity was not raised until the trial was over. *Id.*

⁴⁸ *Id.* at 329.

⁴⁹ *Id.*; accord *Groh v. Brooks*, 421 F.2d 589, 595 (3d Cir. 1970) (first enunciated this list of factors).

⁵⁰ *Green*, 433 F.2d at 329. But see *Hackney v. Newman Memorial Hosp., Inc.*, 621 F.2d 1069, 1072 (10th Cir.) (examination into qualifications of representative enunciated in *Groh* rejected where administratrix had substantial stake in litigation), *cert. denied*, 449 U.S. 982 (1980); *Bishop v. Hendricks*, 495 F.2d 289, 294 n.24 (4th Cir.) (examination based on *Groh* factors advocated in evaluation of reasons for appointment of out-of-state administrator, but inquiry limited by administrator's stake in litigation), *cert. denied*, 419 U.S. 1056 (1974).

⁵¹ *Green*, 433 F.2d at 329. The court determined that the parties would be unreasonably burdened if the case were remanded to apply these factors. *Id.*

⁵² 434 F.2d 1096 (5th Cir. 1970).

sity⁵³ and whether there was sufficient substance⁵⁴ to the appointment of a nonresident administrator to allow a diversity suit. Although the Louisiana administrator of a Texas estate was allegedly appointed for his qualifications and for services performed,⁵⁵ the court found that the administrator did not have substantial ties to the decedent's family. Therefore, his appointment was improper and failed to invoke diversity jurisdiction under section 1359.⁵⁶ In deciding that diversity jurisdiction did not exist, the *White* court inquired into the motive behind the nonresident's appointment, and in so doing, considered whether there was "sufficient substance to the appointment."⁵⁷

The Fourth Circuit, in *Bishop v. Hendricks*,⁵⁸ subsequently misconstrued this language of the Fifth Circuit and placed undue importance thereon.⁵⁹ The court held that a nonresident administrator must have a substantial stake in the litigation for his citizenship to be recog-

⁵³ *Id.* at 1098-99.

⁵⁴ *Id.* If there was sufficient substance to the appointment in view of the factors articulated in *Green and Groh v. Brooks*, 421 F.2d 589, 595 (3d Cir. 1970), then the appointment would be recognized as establishing diversity of the parties for jurisdictional purposes. See *White*, 434 F.2d at 1098-99. The court stated that whether the appointment of the representative was so lacking in substance as to be improper and collusive under § 1359 was a question of fact. *White*, 434 F.2d at 1098 (quoting *McSparran*, 402 F.2d at 876).

⁵⁵ *White*, 434 F.2d at 1099. The administrator was appointed because he represented the estate without charge and had worked with the beneficiary's attorney in the past. The court noted, however, that the administrator was not the only person qualified to serve the estate. *Id.*

⁵⁶ *Id.* at 1100. Since the administrator did not have substantial ties to the family, the court inferred that he was selected by the family's attorney for the convenience of bringing suit in federal court. *Id.* at 1099-1100; see also *Kenebrew v. Columbia Land & Timber Co.*, 454 F.2d 1146, 1146-47 (5th Cir. 1972) (nonresident administrator had no sufficient substantive ties to heirs or to estate to support diversity jurisdiction). The court stated further that allowing this suit to be brought in federal court would not advance any of the functions diversity jurisdiction was designed to serve. *White*, 434 F.2d at 1100.

⁵⁷ *White*, 434 F.2d at 1098-1100. The court, in considering whether there was sufficient substance to the appointment, stated that "[t]his requirement of substantive as well as formal validity of the representative's appointment has been recognized" *Id.* at 1098.

⁵⁸ 495 F.2d 289 (4th Cir.), cert. denied, 419 U.S. 1056 (1974).

⁵⁹ See *Bishop*, 495 F.2d at 294 & n.23. Although the court in *White* never defined what was meant by "sufficient substance to the appointment," the Fourth Circuit interpreted this language to mean that a nonresident administrator *must* have a substantial interest in the litigation for his appointment to support diversity. See *Bishop*, 495 F.2d at 294 & n.23. This interpretation disregarded the fact that the concern over the substance of the appointment was part of a more comprehensive inquiry into the motive behind the appointment. See *White*, 434 F.2d at 1098-99.

nized for diversity purposes.⁶⁰

Bishop involved a nonresident administrator who wished to invoke diversity jurisdiction and who maintained that section 1359 was applicable only when the sole motive underlying the appointment was to create diversity.⁶¹ Relying largely on one of its prior decisions,⁶² the court found that the citizenship of the representative was not determinative of diversity because the administrator failed to show any "real

⁶⁰ *Bishop*, 495 F.2d at 295. The court, advocating the view that the representative must have a substantial stake in the litigation to support diversity, made the following statement:

Only if the Court can conclude that the out-of-state administrator has something more than a nominal relationship to the litigation will the citizenship of an out-of-state administrator sustain diversity, and any reason or motive for the appointment which does not elevate his relationship to the litigation above the level of a nominal party is irrelevant to the issues of diversity.

Id. (footnote omitted); see also *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979)(defendant not allowed to remove wrongful death action to federal court based on administrator's diverse citizenship since administrator did not have substantial stake in litigation), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980); *Vaughn v. Southern Ry.*, 542 F.2d 641, 643-44 (4th Cir. 1976)(in-state ancillary administrator a "straw party" absent something more than nominal interest in outcome of litigation). In *Vaughn*, the decedent's beneficiaries and the defendant were residents of Virginia. *Vaughn*, 542 F.2d at 642. Because the death occurred in North Carolina and the witnesses were in that state, a North Carolina resident was appointed ancillary administrator to bring the action as was required by N.C. GEN. STAT. § 28-173 (1970)(repealed 1970, repeal effective 1975) when this cause of action arose. *Vaughn*, 542 F.2d at 643. Although the purity of motive was not questioned since the appointment was statutorily required, the Fourth Circuit refused to recognize the citizenship of the ancillary administrator for diversity purposes because he had no stake in the outcome of the litigation. *Id.* at 644.

⁶¹ *Bishop*, 495 F.2d at 290-91. The administrator maintained that the reason underlying his appointment was his experience in business affairs. *Id.* at 296.

⁶² See *id.* at 291-92. The *Bishop* court discussed at length the case of *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972), where the court held that the citizenship of the non-resident beneficiaries, and not that of the resident ancillary administrator required by state law, was determinative of diversity. *Miller*, 456 F.2d at 67. In *Miller*, the decedent's beneficiaries, all of whom were Florida residents, wished to sue a North Carolina defendant in federal court. *Id.* at 63-64. The beneficiaries appointed a North Carolina resident as an ancillary administrator as required by North Carolina law for the prosecution of a wrongful death action. *Id.* at 64. The defendant sought to remove the case from the federal court for lack of diversity, but the court upheld diversity jurisdiction, stating that the North Carolina statute should not deprive the Florida beneficiaries of the federal forum in what was clearly an action based on diversity. *Id.* at 67. The *Bishop* court, refusing to limit *Miller* to its facts, stated that implicit in *Miller* was the assumption that the appointment of an out-of-state administrator who had a substantial interest in the outcome of the litigation would be determinative of diversity. *Bishop*, 495 F.2d at 291, 293.

[or] substantial interest in the outcome of the litigation,'” and possessed “‘no stake in the litigation.’”⁶³ The court denied jurisdiction even though in *Bishop* the motive for appointing the administrator was not solely to create diversity jurisdiction.⁶⁴ The “substantial stake” test of *Bishop* and the “motive” test set out in *McSparran* generated disparate results under section 1359 and created a split among the various circuits.⁶⁵

In the instant case, the court reasoned that since section 1359 denies jurisdiction where a party has been improperly or collusively made or joined to invoke jurisdiction of the federal court,⁶⁶ and since prior Fifth Circuit cases emphasized the importance of examining the purpose in the appointment of an administrator,⁶⁷ the diversity inquiry must focus primarily on the motive behind the selection of the administrator.⁶⁸ The court stated that since motive is the ultimate standard for determining the applicability of section 1359,⁶⁹ and since an out-of-state administrator can be selected with a motive other than that of

⁶³ *Bishop*, 495 F.2d at 295 (quoting *Dougherty v. Oberg*, 297 F. Supp. 635, 639 (D.C. Minn. 1969)). The court held that any appointment of a nonresident administrator which was nominal and which had the effect of vesting diversity in an action not truly involving a dispute between citizens of different states violated the purposes of § 1359. *Bishop*, 495 F.2d at 294.

⁶⁴ *Bishop*, 495 F.2d at 291.

⁶⁵ Of the courts that have ruled on this issue, the Second, Third, Fifth and Sixth Circuits have adopted the motive approach. *E.g.*, *Gross v. Hougland*, 712 F.2d 1034 (6th Cir. 1983); *White v. Lee Marine Corp.*, 434 F.2d 1096 (5th Cir. 1970); *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969); *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

The Fourth, Seventh, and Tenth Circuits adopted the substantial stake approach. *E.g.*, *Hackney v. Newman Memorial Hosp.*, 621 F.2d 1069 (10th Cir. 1980); *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979); *Vaughn v. Southern Ry.*, 542 F.2d 641 (4th Cir. 1976); *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974). At one time the Fourth Circuit attempted to combine the two theories. *See Lester v. McFaddon*, 415 F.2d 1101, 1106 & n.11 (4th Cir. 1969) (action was collusive or improper only if lack of stake in outcome and motive to create diversity were both present).

⁶⁶ *Bianca*, 723 F.2d at 398; *see supra* note 6 for text of § 1359.

⁶⁷ *See Bianca*, 723 F.2d at 395-97. The court relied primarily on *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Green v. Hale*, 433 F.2d 324 (5th Cir. 1970); and *White v. Lee Marine Corp.*, 434 F.2d 1096 (5th Cir. 1970). *See supra* notes 41-57 and accompanying text.

⁶⁸ *Bianca*, 723 F.2d at 398. The court stated that the language of the statute incontrovertibly suggested that the motive underlying the naming of an administrator was to guide the diversity inquiry. *Id.*

⁶⁹ *Id.*; *see supra* note 68.

manufacturing diversity,⁷⁰ the administrator's lack of a substantial stake in the outcome cannot of itself bring about the jurisdictional bar of section 1359.⁷¹ The court concluded that substantiality of the administrator's stake in the litigation is only one of the elements to be considered in determining whether the motive for the appointment was proper.⁷² Nonetheless, the court specifically reserved ruling on the question whether diversity jurisdiction will be upheld when the administrator who is appointed with a motive to create diversity also possesses a substantial stake in the litigation.⁷³

By holding that the citizenship of an administrator may only be disregarded where there has been a determination that he was named with a motive to manufacture diversity,⁷⁴ the Fifth Circuit has demonstrated its respect for the subtleties involved in the interpretation and application of section 1359.⁷⁵ While recognizing that the motive factor is preeminent, considering the language and purpose of the statute,⁷⁶ the court has acknowledged that an administrator's stake in the litigation may be a relevant factor.⁷⁷ The opinion presents the view of the Fifth Circuit in a manner that is not subject to misinterpretation by those circuits which would argue in favor of the substantial stake approach.⁷⁸ The opinion thus will be of precedential value within the Fifth Circuit and may also serve as an illuminating guide for other

⁷⁰ See *Bianca*, 723 F.2d at 397-98.

⁷¹ *Id.* at 398. The court also concluded that under the language of § 1359, the substantial stake test could not be justified. *Id.*; see *supra* note 68.

⁷² See *Bianca*, 723 F.2d at 397. To determine the motive of the appointment the court considered not only whether the administrator had a substantial stake in the litigation, but also whether he had administrative duties beyond the prosecution of the lawsuit, and whether the estate contained assets other than the lawsuit. If a proper motive underlies the appointment, then none of these elements are independently necessary to sustain jurisdiction. *Id.* The ultimate inquiry is to be into motive, with substantiality of stake a "relevant but not controlling" indicator. *Id.* at 399.

⁷³ *Id.* at 398 n.7. The court did acknowledge, however, that a per se rule favoring jurisdiction in such a situation had some merit. *Id.*

⁷⁴ *Bianca*, 723 F.2d at 399.

⁷⁵ See *supra* notes 66-72 and accompanying text.

⁷⁶ See *supra* notes 68-72.

⁷⁷ *Bianca*, 723 F.2d at 399; see *supra* notes 71-72 and accompanying text.

⁷⁸ See *Bianca*, 723 F.2d at 396-98; *supra* note 65 (list of circuits favoring substantial stake test). While the *Bianca* court maintained that the motive approach had been advocated by the Fifth Circuit as early as *Bass*, 432 F.2d at 766-67, it noted that certain language used in *White*, 434 F.2d at 1098-99 (5th Cir. 1970), had been misinterpreted by the Fourth Circuit in *Bishop*, 495 F.2d at 294 n.23. *Bianca*, 723 F.2d at 398. The *Bianca* opinion reduces the chance that the Fifth Circuit's position will be misinterpreted in the future by other courts.

courts.

Although the substantial stake approach exemplified in *Bishop*⁷⁹ is not without admirable attributes,⁸⁰ the Fourth Circuit has ignored or misinterpreted the language of section 1359 in an effort to create consistent and predictable decisions.⁸¹ Indeed, the greatest advantage of the substantial stake test over the motive test is that the substantial stake test may be more easily and objectively applied.⁸² The purpose of section 1359, however, is to bar from the federal courts only those actions where diversity has been *collusively* or *improperly* created.⁸³ The substantial stake approach does not fairly meet that purpose since it would bar from federal courts a nonresident representative who did not have a substantial stake in the litigation, even in those instances where there was no collusion or impropriety in his appointment.⁸⁴ To determine whether there has been a collusive or improper creation of diversity jurisdiction, a more subjective standard than substantial stake is required.⁸⁵

Inquiry into motive must be considered a necessary part of the application of section 1359,⁸⁶ even if such inquiry is costly, difficult, and time-consuming.⁸⁷ Until the Supreme Court specifically addresses this issue,⁸⁸ or until Congress enacts further legislation⁸⁹ concerning

⁷⁹ See *supra* notes 58-64 and accompanying text.

⁸⁰ *Bianca*, 723 F.2d at 398. The substantial stake approach attempts to alleviate perjury or manipulation of factual evidence that may occur with inquiries into motive. *White*, 434 F.2d at 1099 n.8. Another advantage of the substantial stake approach is that it invokes federal jurisdiction only when it is necessary to protect a party's personal interest from local bias. *Bishop*, 495 F.2d at 292.

⁸¹ See *Vaughn v. Southern Ry.*, 542 F.2d 641, 645 (4th Cir. 1976) (Butzner, J., dissenting) (referred to *Bishop* as being based on desire to create symmetry).

⁸² *Bianca*, 723 F.2d at 398; see *supra* note 80.

⁸³ See *supra* notes 6, 15 and accompanying text.

⁸⁴ *Bianca*, 723 F.2d at 397. The *Bianca* opinion recognizes that the substantial stake approach of *Bishop* and *Vaughn* is not an absolute approach. *Id.* at 397.

⁸⁵ See Comment, *supra* note 14, at 724-25 (determination of subjective quality of motive).

⁸⁶ See *supra* notes 29, 50, 68 and accompanying text.

⁸⁷ See *Esposito v. Emery*, 402 F.2d 878, 880-83 (3d Cir. 1968) (Biggs, J., dissenting) (emphasized that inquiry into purpose would be time-consuming, would result in uncertainty, and would lead to perjury); 6 C. WRIGHT & A. MILLER, *supra* note 25, at § 1557 (difficult and time-consuming investigation involved in determining motive).

⁸⁸ See *supra* note 34 and accompanying text.

⁸⁹ The standard proposed by the American Law Institute for determining diversity is that the citizenship of a representative would be deemed that of the party whom he represents. While the standard proposed by the American Law Institute would provide a simpler and more objective method of determining diversity than either the motive approach or the substantial stake approach, this proposed standard has not been acted

the artificial creation of diversity, the differing interpretations of how to apply section 1359 are likely to continue. In light of the language and purpose of section 1359, however, the motive approach for determining the collusive or improper manufacture of diversity is the most appropriate of these conflicting interpretations.

Ralph Calhoun Brashier, Jr.

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